(1)

Supreme Court, U.S.
FILED

95 168 JUL 27 1995

No. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

ANTHONY EDWARD KESTLER
Petitioner,

v.

BOARD OF TRUSTEES OF THE NORTH CAROLINA LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM,
Respondent

Petition for Writ of Certiorari to the
Fourth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

Fred W. DeVore, III
DEVORE & ACTON, P.A.
Suite 811
301 S. McDowell Street
Charlotte, NC 28204-2622
(704) 377-5242

Counsel for Petitioner

8700

QUESTION PRESENTED

Is a Federal Court of Appeals Bound by a Ruling of the State Court of Last Resort Which Has Ruled as a Matter of State Law that a Disabled Police Officer's Right to Specific Benefits Under Local Government Employment Contracts "Vests Upon Completion of Five Years of Creditable Service" and Not Upon the Happening of a Subsequent Event such as the Occurrence of Disability or Separation from Service?

LIST OF PARTIES

A. Plaintiff/Petitioner

Anthony Edward Kestler:

A citizen of the United States residing in Mecklenburg County, North Carolina, who is a former police officer who became disabled in the line of duty and who is receiving disability pension from the State of North Carolina through the defendants.

B. Respondents/Defendants

North Carolina Local Governmental Employees' Retirement System:

A North Carolina corporation which implements the pension plan of the plaintiff/petitioner.

Board of Trustees of the North Carolina Local Governmental Employees' Retirement System:

A body politic and corporate; the governing body of the North Carolina Local Governmental Employees' Retirement System.

Dennis Ducker:

Director of the North Carolina Local Governmental Employees' Retirement System (in his official capacity).

Harlan E. Boyles:

Treasurer of the State of North Carolina and Chairman of the Board of Trustees for the North Carolina Local Governmental Employees' Retirement System (in his official capacity).

The State of North Carolina

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

LIST OF PARTIES ii

TABLE OF AUTHORITIES vii

OPINION BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS, TREATISES, STATUTES, ORDINANCES, and REGULATIONS .. 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 5

I. The Fourth Circuit Court of Appeals Decided a Federal Constitutional Question of Impairment by State Statute of Petitioner's Retirement Contract in a Manner Contrary to the Court of Last Resort of the State of North Carolina 5

  A. The Time of Vesting of Retirement Benefits Under Employment Contracts Between Local Governments and Public Employees in North Carolina was Decided as a Matter of Law by the North Carolina Supreme Court on 6 October 1988 in the Case of *Simpson Government Employees Retirement System,* 88 N.C. App. 218, 363 S.E.2d 90 (1987),

aff'd per curiam, 323 N.C. 362, 372 S.E.2d 559 (1988) Affirming the Decision of the Intermediate Appellate State Court 9

B. The Court of Appeals is Obliged to Follow the Last Pronouncement of State Law as Proclaimed by the State's Court of Last Resort [i.e. *Simpson v. Government Employees Retirement System,* 88 N.C. App. 218, 363 S.E.2d 90 (1987), *aff'd per curiam,* 323 N.C. 362, 372 S.E.2d 559 (1988)] and not "the most analogous factual" comparison of Conflicting Case Decisions of Different Panels of the Lower Appellate Court Panels. (i.e. the Court of Appeals decisions in *Griffin v. The Board of Commissioners of the Law Enforcement Officers' Benefit and Retirement Fund,* 84 N.C. App. 443, 352 S.E.2d 882, *appeal dismissed,* 319 N.C. 672, 352 S.E.2d 776 (1987). 11

C. The Authority Not Followed by the Court of Appeals, *Simpson,* is (1) an Unambiguous Pronouncement of the Controlling Law on the Time of Vesting of Local Public Employee Retirement Benefits, (2) is the Last Statement of the Controlling Law, and (3) Since Being Issued Has Been Cited as Controlling Authority on at Least Two Occasions. *Griffin* Has Never Been Cited as Authority Except by the Fourth Circuit Court of Appeals in the Case *Sub Judice.* 12

D. The Fourth Circuit Relied on *Griffin* which has been Overruled by Implication, if not expressly, by *Simpson*. 15

II. The North Carolina Supreme Court's Affirmance *per curiam* of Simpson Adopting the Holding of the United States Supreme Court in *United States Trust Co. v. New Jersey,* 431 U.S. 1 (1977) Relating to Impairment of the Obligations of Contract and Determining the Time of Vesting of Employment Contract Rights of Retired Public Employees, the Contrary Holding of the Federal Court of Appeals Creates Problems of *Stare Decisis* and Federalism in Numerous Other Pending Cases by North Carolina Public Retirees in State and Federal Court ... 17

CONCLUSION 19

TABLE OF CASES AND AUTHORITIES

A. CASES

Bailey v. State Retirement System, 330 N.C. 227, 412 S.E.2d 295 (1991) 13

Bigham v. Foor, 201 N.C. 14, 158 S.E. 548 (1931) . . 12

Cole v. Cole, 229 N.C. 757, 51 S.E.2d 491 (1949) . . 13

Faulkenbury v. State Employees' Retirement System, 108 N.C. App. 357, 424 S.E.2d 420, 426-427 (1993) 14, 18

Fletcher v. Peck, 6 Cranch, 87, 137-139, 3 L.Ed. 162 (1810) 17

Griffin v. The Board of Commissioners of the Law Enforcement Officers' Benefit and Retirement Fund, 84 N.C. App. 443, 352 S.E.2d 882, *appeal dismissed,* 319 N.C. 672, 352 S.E.2d 776 (1987) . . . . 3, *passim*

LaBroad v. State Retirement System, 3:94CV210McK (pending in the Western District of Federal Court for North Carolina) 18

Peele v. Teacher's Retirement, 92 CVS 11978 (class action pending in Wake County) 18

Simpson v. Government Employees Retirement System, 88 N.C. App. 218, 363 S.E.2d 90

(1987), *aff'd per curiam,* 323 N.C. 362, 372 S.E.2d 559 (1988) . . . . 3, *passim*

United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) 8, 10, 15, 17

Wheaton v. Retirement System, 94 CVS 08212 (class action pending in Wake County) 18

Woodard v. NC Local Gov. Emp. Ret. Sys., 108 N.C. App. 378, 424 S.E.2d 421 (N.C. Ct. App. 1993) 14

Woodard v. Retirement System, 91 CVS 00368 (class action pending in Wake County) 18

B. STATUTES

28 U.S.C. § 1254(1) 2

42 U.S.C. § 1982 2

N.C. Gen. Stat. § 128-35 . . . . 2, 5

N.C. Gen. Stat. § 143-166 6

C. RULES

Rule 3 of the Federal Rules of Appellate Procedure. 2

D. CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 10, cl. 1 2

No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

ANTHONY EDWARD KESTLER
Petitioner,

v.

BOARD OF TRUSTEES OF THE NORTH
CAROLINA LOCAL GOVERNMENTAL
EMPLOYEES' RETIREMENT SYSTEM,
Respondent

Petition for Writ of Certiorari to the
Fourth Circuit Court of Appeals

Anthony Edward Kestler respectfully petitions for a Writ of Certiorari to review the judgment of the Fourth Circuit Court of Appeals.

OPINION BELOW

The Opinion of the Fourth Circuit Court of Appeals is reported at 48 F.3d 800 (1995). App. at A-1. The denial of the Petition for Rehearing *En Banc* was denied on April 28, 1995. App. at A-12. That opinion reversed the decision of the Federal District Court for the Western District of North Carolina, reported at 808 F.Supp. 1220 (W.D.N.C. 1992). App. at A-16. (Judgment enjoining the State, app. at 14).

JURISDICTION

The Fourth Circuit Court of Appeals rendered its decision February 23, 1995. A Petition for Rehearing *En Banc* was denied on April 28, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the District Court was 42 United States Code § 1982 and appeal to the court of appeals was made by the defendants pursuant to Rule 3 of the Federal Rules of Appellate Procedure.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Contract Clause of the United States Constitution provides in pertinent part that, "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." U.S. Const. art. I, § 10, cl. 1

The maintenance of annuity reserves and pension reserves as provided for, and regular interest creditable to the various funds as provided in North Carolina General Statute § 128-30, and the payment of all pensions, annuities, retirement allowances, refunds and other benefits granted under the provisions of this Article, are hereby made obligations of the pension accumulation fund. All income, interest and dividends derived from deposits and investments authorized by this Article shall be used for the payment of said obligations of the said fund. N.C. Gen. Stat. § 128-35

Pertinent portions of the North Carolina General Statutes governing the pension funds for police officers appear in the appendix as exhibits to the Stipulation. App. at 35. N.C. Gen. Stat. § 143-166 *et. seq.*

STATEMENT OF THE CASE

A. Procedural Background and How the Federal Question Was Presented

The defendants are fiduciaries responsible for overseeing the statutorily based pension plans for state employees. Anthony Edward Kestler sued the North Carolina Retirement System in the Western District of Federal Court on July 12, 1991 complaining that reductions in his pension benefits, after he became vested in the program, violated the Contract Clause of the United States Constitution. The trial judge allowed judgment for Kestler on this basis and enjoined the State from enforcing the earnings cap. App. at A-14. The State of North Carolina appealed and a divided panel on the Fourth Circuit reversed the trial court. App. at A-01. A divided panel also denied Kestler's Petition for Rehearing *En Banc.* App. at A-12. The trial judge, Judge Graham Mullen, and Circuit Judge Hall in his dissent relied on the 1988 North Carolina Supreme Court case of *Simpson v. Government Employees Retirement System,* 88 N.C. App. 218, 363 S.E.2d 90 (1987), *aff'd per curiam,* 323 N.C. 362, 372 S.E.2d 559 (1988). Circuit Judges Widener and Russell relied on the 1987 North Carolina Court of Appeals antedated decision of *Griffin v. The Board of Commissioners of the Law Enforce-*

ment Officers' Benefit and Retirement Fund, 84 N.C. App. 443, 352 S.E.2d 882, *appeal dismissed,* 319 N.C. 672, 352 S.E.2d 776 (1987).

B. The History of the Retirement Pension Plan for Disabled Police Officer Anthony Edward Kestler

The facts of the case were stipulated by the parties at the trial level. (The stipulations appear at app. at A-35). Anthony Kestler joined the Mecklenburg County Police Department in 1974. The State of North Carolina agreed to provide him with a pension plan, after he had been on the force for five years, which included disability retirement. In summary, the disability provisions provided that if an officer was injured and permanently disabled, he would receive disability income from the State. This disability income was to be paid unless the officer was able to return to the performance of his duties *as a police officer.* Like many private disability policies, the amount of the disability payments was not reduced even if the disabled officer could earn income in an occupation other than his law enforcement profession.

Although the name of the plan changed several times, the benefits described above did not change until 1980, after officer Kestler had become vested in the plan. (Stip. ¶¶ 8,14, app. at A-38, A-40) In 1980, the North Carolina Legislature ratified a bill which placed a limitation or cap on the amount of earnings a disabled officer could earn in another occupation and still receive his full disability benefits. (Stip. ¶ 9, app. at A-38).

Officer Kestler became injured in the line of duty in 1985 and was declared permanently and totally incapacitated for the further performance of duty as a law enforcement officer with the Mecklenburg County Police Department on February 18, 1986. (Stip. ¶16, app. at A-41). He was unable to continue his law enforcement career. Although he had only been educated and trained as a police officer, and despite his disability, he eventually found employment in other occupations to help support his family. (Stip. ¶ 17, app. at A-41) Until 1991, he never earned enough income to exceed the maximum allowed under the earnings limitation. (Stip. ¶ 18, app. at 42).

Under the modified disability plan, each year disabled employees were required to report the amount of any outside income to the State. If it exceeded the earnings limitation imposed by the statute, the employee was required to refund a portion of the disability pension. (Stip. ¶ 9, app. at A-40).

The contractual obligation to pay Kestler the full benefits of the pension plan is set forth, in part, in N.C. Gen. Stat. § 128-35. Kestler contends that the earnings limitation imposed by the statute after he became vested is a violation of the contract clause of the United States Constitution. U.S. Const. art. I, § 10, cl. 1.

REASONS FOR GRANTING THE PETITION

I. The Fourth Circuit Court of Appeals Decided a Federal Constitutional Question of Impairment by State Statute of Petitioner's Retirement Contract in a Manner Contrary to the Court of Last Resort of the State of North Carolina.

In 1987 and 1988, the state courts of North Carolina addressed similar issues of whether the state legislature could reduce pension benefits of vested state or local governmental employees. In a matter of eight months, the North Carolina Court of Appeals rendered two decisions. The first was *Griffin v. The Board of Commissioners of the Law Enforcement Officers' Benefit and Retirement Fund,* 84 N.C. App. 443, 352 S.E.2d 882, *appeal dismissed,* 319 N.C. 672, 352 S.E.2d 776 (1987). The second was *Simpson v. Government Employees Retirement System,* 88 N.C. App. 218, 363 S.E.2d 90 (1987) *aff'd per curiam* 382 S.E.2d 559 (N.C. 1988). At first glance, the two opinions are seemingly irreconcilable.

The facts in *Griffin* are as follows: In September, 1981 Griffin, a disabled, retired Mecklenburg County law enforcement officer, began receiving disability retirement payments from the Law Enforcement Officers' Benefit and Retirement Fund established by North Carolina General Statute § 143-166, *et. seq.* Because he had certain other earnings during 1982, in April 1983 the state retirement system demanded, under the authority of § 143-166(y), that Griffin return a certain amount of the money that he received from the fund that year. Griffin paid the demanded sum under protest and brought a suit to recover it. In the complaint he alleged that the provisions of § 143-166(y) did not apply to him because he was injured, although not declared disabled, before the enactment of the statute reducing his pension disability benefits.

The Court of Appeals ruled against officer Griffin. In a brief opinion, the Court in *Griffin* held:

> The legislation that first reduced the benefits of future disability retirees who work and earn money was enacted in 1980, more than a year before plaintiff retired, and *we know of no authority for the proposition that plaintiff's retirement rights vested before then.* The decisions that plaintiff relies upon involved employees whose benefits were reduced after their retirement, which is not plaintiff's situation, and a discussion of those authorities would serve no purpose.

84 N.C. App. at 445, 352 S.E.2d at 884. (emphasis added). *Griffin* was eventually settled and the case dismissed by the North Carolina Supreme Court. 319 N.C. 672, 352 S.E.2d 882 (1987).

The facts in *Simpson* are as follows: The plaintiff, Simpson,[1] was a former fireman for the City of Greensboro who qualified for disability benefits under the Retirement System. Mr. Simpson became a vested member of the Retirement System by August 6, 1969 and qualified for disability benefits on March 1, 1983.[2] Eighteen months before fireman Simpson became disabled, and fourteen years after he became vested, the General Assembly modified the statutory pension plan on October 9, 1981 and reduced the disability benefits for the state employees, including the vested employees. The gravamen of Simpson's complaint was that he was entitled to have his disability retirement benefits calculated according to the more favorable benefits in effect at the time he became a vested member of the retirement system. The Court held that fireman Simpson's right to his promised retirement vested after five years of creditable service and that retirement could not be adversely modified unless the tests in *United States Trust Co. v. New Jersey,* 431 U.S. 1 (1977) had been met. 88 N.C. App. at 224, 363 S.E. 2d at 94.

---

[1] *There were actually two plaintiffs in Simpson; the plaintiff Moore, had identical claims.*

[2] *Although the pension statute cited in Simpson was different than that cited in Griffin, the pertinent language of the statutes is identical and the pension plans were identical. The State does not contend there is a difference in the statutory scheme of the disability plans.*

The petitioner, Kestler, contends the Fourth Circuit relied on *Griffin* from the North Carolina Court of Appeals which was supplanted eight months later by *Simpson. Simpson*, unlike *Griffin,* was affirmed *per curiam* by the North Carolina Supreme Court and has since been cited as controlling authority.[3]

It is clear from the opinion in *Kestler* that the Fourth Circuit struggled with the decision as to whether to rely on *Griffin* or *Simpson* in making its decision. "It is apparent from reading *Griffin* and *Simpson* that the holdings may be inconsistent. . ." 48 F.3d at 804. The majority chose to follow *Griffin* while Circuit Judge Hall, in his dissent, and the trial judge agreed that *Simpson* was controlling.

Reduced to its simplest terms, officer Griffin contended that the legislatively imposed earnings cap in the state retirement plan was unconstitutional. Fireman Simpson challenged the same basic retirement plan, but he challenged the fact the legislature adversely changed the formula used to calculate his disability benefits. Both officer Griffin and fireman Simpson had vested in their retirement plan at the time the onerous legislation was enacted.

---

[3] *See discussion infra at page 13*

A. The Time of Vesting of Retirement Benefits Under Employment Contracts Between Local Governments and Public Employees in North Carolina was Decided as a Matter of Law by the North Carolina Supreme Court on 6 October 1988 in the Case of *Simpson v. Government Employees Retirement System,* 88 N.C. App. 218, 363 S.E.2d 90 (1987), *aff'd per curiam,* 323 N.C. 362, 372 S.E.2d 559 (1988) Affirming the Decision of the Intermediate Appellate State Court.

Apparently because *Griffin* dealt with the earnings cap and *Simpson* dealt with the disability formula, the Fourth Circuit mistook *Griffin* as controlling the issues raised by *Kestler.*[4] However, as Judge Mullen pointed out in his District Court opinion, "[I]t is apparent that *Griffin* did not address the issue which is presented in both *Simpson* and in the present case." 808 F. Supp. at 1226.

Officer Griffin had become injured before the enactment of the statute which reduced his benefits but was not declared disabled until after the statute was passed. Officer

---

[4] *[W]e are of the opinion that we should follow Griffin, a case on facts so similar to the case at hand to be indistinguishable." 48 F.3d at 804.*

Griffin argued that the statutes and policies in effect at the time he was *injured* controlled his retirement benefits, not the date of his disability.[5] The Court in *Griffin* wrote, "[W]e know of no authority for the proposition that plaintiff's retirement rights vested before [he was declared disabled]." *Griffin* at 445, 352 S.E.2d at 884. The "authority" which was absent in *Griffin* was established in *Simpson,* decided just eight months later.

In *Simpson* the Court of Appeals, stating this was a case of "first impression," addressed the issue of when does a participant of the state retirement plan become vested? If vested, an employee's benefits could not be reduced without a compelling reason under the test set forth by this Court in *United States Trust Co. v. New Jersey,* 431 U.S. 1 (1977). In a lengthy discussion, the *Simpson* Court stated:

> A public employee has a right to expect that the retirement rights bargained for in exchange for his loyalty and continued services, and continually promised him over many years, will not be removed or diminished. Plaintiffs, as members of the North Carolina Local Governmental Employees' Retirement System, *had a contractual right to rely on the terms of the retirement plan* as

---

[5] *This is a different vesting issue than that raised in __Simpson__ and __Kestler__ although the majority believed the issues were identical. Officer Kestler contends he was vested before the statute was amended decreasing his benefits. He was not injured and disabled until after the passage of the statute. However, because he was vested, the state could not deprive him of his full disability benefits. __See Simpson__ __supra__ at page 8.*

> these terms existed *at the moment their retirement rights became vested.*

Id. at 224, 363 S.E. 2d at 94. (emphasis added) With this holding in *Simpson,* the majority should have reached its conclusion that *Griffin* was *not* controlling and sustained the trial court's decision.

B. The Court of Appeals is Obliged to Follow the Last Pronouncement of State Law as Proclaimed by the State's Court of Last Resort [i.e. *Simpson v. Government Employees Retirement System,* 88 N.C. App. 218, 363 S.E.2d 90 (1987), *aff'd per curiam,* 323 N.C. 362, 372 S.E.2d 559 (1988)] and not "the most analogous factual" comparison of Conflicting Case Decisions of Different Panels of the Lower Appellate Court Panels. (i.e. the Court of Appeals decisions in *Griffin v. The Board of Commissioners of the Law Enforcement Officers' Benefit and Retirement Fund,* 84 N.C. App. 443, 352 S.E.2d 882, *appeal dismissed,* 319 N.C. 672, 352 S.E.2d 776 (1987).

The majority in *Kestler* wrote, "It is apparent from reading *Griffin* and *Simpson* that the holdings of those two cases may be inconsistent . . ." 48 F.3rd at 804. However, the majority erroneously cites *Simpson* as being merely a North Carolina Court of Appeals decision. *Simpson* is cited as "*Simpson v. Government Emp. Retire. Sys.,* 88 N.C. App. 218, 363 S.E.2d 90 (1987)." It does not acknowledge the

North Carolina Supreme Court's review of the case in 1988. 323 N.C. 362, 372 S.E.2d 559 (1988).[6]

The *Griffin* opinion narrowly addressed the claims raised by Mr. Griffin which were that he was entitled to benefits which existed at the time of his injury, rather than at the time of his disability determination. However, the Court of Appeals in *Simpson*, in a six page opinion, thoroughly discussed all of the issues germane to the decision to be made in *Kestler*. The *Simpson* holding was then affirmed *per curiam* by the North Carolina Supreme Court. 323 N.C. 362, 382 S.E.2d 559 (1988). It has long been established in our jurisprudence that a *per curiam* opinion stands upon the same footing as those opinions containing a more extended discussion or more numerous citations of authority and has the same legal precedent as a full opinion rendered by the Supreme Court. *Bigham v. Foor*, 201 N.C. 14, 158 S.E. 548 (1931).

C. The Authority Not Followed by the Court of Appeals, *Simpson*, is (1) an Unambiguous Pronouncement of the Controlling Law on the Time of Vesting of Local Public Employee Retirement Benefits, (2) is the Last Statement of the Controlling Law, and (3) Has Since Being Issued Been Cited as Controlling Authority on at Least Two Occasions. *Griffin* Has Never Been Cited as Authority Except by the Fourth

---

[6] *Simpson was correctly cited by Judge Hall in his dissent with reference to the North Carolina Supreme Court. Discretionary review was denied by the Supreme Court in Griffin, 319 N.C. 672, 356 S.E.2d 776 (1987).*

Circuit Court of Appeals in the Case *Sub Judice.*

In response to the majority's opinion that *Simpson* did not explicitly overrule *Griffin,* Circuit Judge Hall made a compelling argument.

> The [North Carolina Court of Appeals'] opinions in *Griffin* and *Simpson* were written by different three-member panels[7] of North Carolina's intermediate appellate court. The majority cites *Cole v. Cole,* 229 N.C. 757, 51 S.E.2d 491 (1949)] for the proposition that North Carolina requires a "clear and impelling inference" that an earlier case directly involving the same principle is being implicitly overruled.[8] While the opinion in *Simpson* may not have provided a sufficiently clear inference, its core ruling, and not *Griffin's,* was upheld when the same principle arose again in the same court five years later.

Judge Hall was referring to *Faulkenbury v. State Employees' Retirement System,* 108 N.C. App. 357, 424 S.E.2d 420 (1993). *Simpson* has also been cited by the North Carolina Supreme Court in *Bailey v. State Retirement*

---

[7] *In a footnote, Judge Hall noted that North Carolina appellate judge Cozort sat on both panels but did not write either opinion.*

[8] *Cole was decided well before there was an intermediate appellate court in North Carolina. The Court of Appeals was created in 1967. 1967 Sess. Laws c. 108, s. 1 (codified at N.C. Gen. Stat. § 7A-16 (1969).*

System, 330 N.C. 227, 412 S.E.2d 295 (1991).[9] Both of these cases dealt with identical vesting issues as in *Kestler* in the same state retirement scheme. The Court in *Faulkenbury* not only cited *Simpson* but discussed the "guiding principle" behind their holding in *Simpson.*

> In *Simpson,* this Court held that the relationship between vested members of the pension fund and the Retirement System is contractual. *[Simpson]* at 223, 363 S.E.2d at 93. This is so, we reasoned, because a government retiree's pension is correctly characterized as deferred compensation to which the retiree is contractually entitled. *[Simpson]* at 223, 363 S.E.2d at 94. *Hence, a statute that diminishes the calculated benefits of an employee impairs that employee's contractual rights.*

Faulkenbury, 108 N.C. App. at 357, 424 S.E.2d at 426. (emphasis added) *Simpson* could not be more directly on point in the issues *sub judice.*

In contrast, *Griffin* has *never been cited as authority* until the Fourth Circuit's holding in *Kestler.* Ironically, *Griffin* was mentioned, then ignored, in *Simpson.*

---

[9] *Actually, Simpson was also authority for the decision in Woodard v. NC Local Gov. Emp. Ret. Sys., 108 N.C. App. 378, 424 S.E.2d 431 (N.C. Ct. App. 1993) which was a companion case to Faulkenbury, and which adopted by reference the arguments advanced in that case.*

> Plaintiffs contend that an adverse change in the benefit structure after vesting constitutes an impairment of contractual rights. In response, defendants contend, first, that North Carolina case law either does not support plaintiffs' position, or controverts it, as in *Griffin v. Bd. of Com'rs. of Law Officers' Retirement Fund,* 84 N.C. App. 443, 352 S.E.2d 882, *disc. rev. denied,* 319 N.C. 672, 352 S.E.2d 776 (1987). Defendants claim *Griffin* stands for the proposition that the General Assembly can make changes in the disability retirement structure and apply those changes to members with vested rights who have not yet retired on disability retirement at the time the changes came into force.

The *Simpson* Court never mentions *Griffin* again and renders an opinion diametrically opposed, holding that the state's diminution of benefits impairs its obligation of contract and therefore the tests developed by this Court in *Trust* must be applied.

Griffin was correctly distinguished by Judge Graham C. Mullen in his District Court opinion and Judge Hall in his dissent to the majority's holding in *Kestler.*

D. The Fourth Circuit Relied on *Griffin* which has been Overruled by Implication, if not expressly, by *Simpson.*

As advanced by Judge Hall in his dissent, the clear and unambiguous reading of *Simpson* is that it overrules the holding in *Griffin.*

> There simply is no way to reconcile the holdings in *Griffin* and *Simpson.* Although noting that "[w]hile the principles involved in *Griffin* and *Simpson* are similar, they are not the same. . . ." *ante* at 9, the majority fails to identify any differences beyond those in the factual settings. The principles involved are precisely the same, and the holdings are diametrically opposite. *Griffin* holds that a retiree receives the level of pension benefits calculated in accordance with the statute in existence at the time he actually begins to receive the benefits, *i.e.* at retirement, while *Simpson* holds that it is the computation method in effect when the employee has met the service requirements for future benefits, *i.e.* before retirement, that determines what level of benefits he will receive. Each panel designated the pivotal moment as the point of "vesting." The resolution of the appeal before us depends on the answer to a single question: Which case do we follow?

48 F.3d at 805. Judge Hall then reasons that because other North Carolina cases have been decided under *Simpson,* not *Griffin,* that *Simpson* is clearly controlling.[10] This Petition respectfully suggests that the Fourth Circuit in interpreting state law should also be persuaded by the precedent established in *Simpson* and render an opinion consistent therewith.

---

[10] See *Faulkenbury v. Teachers' and State Employee's Retirement System of N.C.,* *424 S.E.2d 420, 426 (N.C. App. 1993).*

II. The North Carolina Supreme Court's Affirmance *per curiam* of Simpson Adopting the Holding of the United States Supreme Court in Trust Relating to Impairment of the Obligations of Contract and Determining the Time of Vesting of Employment Contract Rights of Retired Public Employees, the Contrary Holding of the Federal Court of Appeals Creates Problems of *Stare Decisis* and Federalism in Numerous Other Pending Cases by North Carolina Public Retirees in State and Federal Court.

If this Court allows *Griffin* to stand as the controlling law in this area, it will subvert its holding in *United States Trust Co. v. New Jersey,* 431 U.S. 1 (1977) where Justice Blackmum, writing for the Court said, "It long has been established that the Contract Clause limits the power of the States to modify their own contracts as well as to regulate those between private parties." *Fletcher v. Peck,* 6 Cranch, 87, 137-139, 3 L.Ed. 162 (1810). If the states are allowed to diminish the rights of vested government employees without accountability for their actions, the tests for such state action as developed in *Trust,* and the very Contract Clause of the United States Constitution, are rendered meaningless.

Griffin stands for the proposition that North Carolina can modify its pension contract with its employees at any time prior to the employees' retirement, despite the fact that its loyal employees have received a vested promise of certain benefits. Under the rationale in *Griffin,* the state could choose to completely dissolve or abandon the pension rights of its employees if it does so at any moment prior to the employee's retirement - regardless of the length of service or relied upon promises of benefits.

The petitioner further urges the Court to allow his petition because of the import of the holding in this matter. There is much litigation in our state which has been filed based on the precedent in *Simpson.* Those cases include the following: *LaBroad v. State Retirement System, 3:94CV210McK* (pending in the Western District of Federal Court for North Carolina) (class certification pending); *Faulkenbury v. Teacher's Retirement,* 5:94-CIV-464-BO1 (class action pending in the Eastern District of Federal Court of North Carolina); *Woodard v. Retirement System,* 5:94-CIV-463-BO2 (class action pending in the Eastern District of Federal Court of North Carolina). *Faulkenbury v. Teacher's Retirement,* 90 CVS 12090 (class action pending in Wake County, North Carolina); *Woodard v. Retirement System,* 91 CVS 00368 (class action pending in Wake County); *James H. Pou Bailey, et al. v. State of North Carolina,* 92 CVS 10221 (pending in Wake County); *Peele* v. *Teacher's Retirement,* 92 CVS 11978 (class action pending in Wake County); and *Wheaton v. Retirement System,* 94 CVS 08212 (class action pending in Wake County).

All of these cases have issues which may be adversely affected by the Fourth Circuit's decision to follow *Griffin* rather than *Simpson;* therefore, there is a compelling reason to be certain that the correct law is applied to the facts in *Kestler.* It is imperative that the Court consider this matter in light of the most recent and controlling precedent in our state.

CONCLUSION

Impairment of contracts by state law must necessarily be decided on a case-by-case basis. When the court of appeals has jurisdiction over a federal question based in part on state law, the federal court is absolutely bound to follow the local law as pronounced by that state's court of last resort. Factually similar cases may be instructive, but once the law is determined, under principles of *stare decisis* all subsequent cases must be decided on that law. Federalism is a "two-way street."

Officer Kestler, for the special and important reasons above stated and because of uncertainty created by the Court of Appeals, respectfully moves that this Court, in its discretion, grant the Writ necessary for full judicial review on the merits that control this case, numerous other pending cases in state and federal courts, and the constitutional and property rights of over 250,000 active and retired members of the public retirement systems of North Carolina.

This the 27th day of July, 1995.

Fred W. DeVore, III
DEVORE AND ACTON, P.A.
Attorney for the Petitioner
811 Cameron Brown Building
301 South McDowell Street
Charlotte, NC 28204
(704) 377-5242

APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

ANTHONY EDWARD KESTLER,
Plaintiff-Appellee,

v.

BOARD OF TRUSTEES OF NORTH CAROLINA LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM, A Body Politic And Corporate; DENNIS DUCKER, Director of the North Carolina Local Governmental Employees' Retirement System (in his official capacity); HARLAN E. BOYLES, Treasurer Of The State Of North Carolina And Chairman Of The North Carolina Local Governmental Employees' Retirement System (in his official capacity),
Defendants-Appellants,

and

NORTH CAROLINA LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM, A Corporation; STATE OF NORTH CAROLINA,
Defendants.

No. 93-1123

Appeal from the United States District Court
for the Western District of North Carolina, at Charlotte.
Graham C. Mullen, District Judge.
(CA-91-221)

Argued: October 26, 1993

Decided: February 23, 1995

Before RUSSELL, WIDENER, and HALL,
Circuit Judges.

Reversed and remanded by published opinion. Judge Widener wrote the majority opinion, in which Judge Russell joined. Judge Hall wrote a dissenting opinion.

COUNSEL

ARGUED: Alexander McClure Peters, Assistant Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellants. Fred William DeVore, III, DEVORE & ACTON, P.A., Charlotte, North Carolina, for Appellee. **ON BRIEF:** Michael F. Easley, Attorney General of North Carolina, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellants.

OPINION

WIDENER, Circuit Judge:

The plaintiff, former Mecklenburg County Police Officer Anthony Edward Kestler, brought this action pursuant to 42 U.S.C. § 1983 alleging that the defendants, the Board of Trustees of North Carolina Local Government Employees' Retirement System (Retirement System) and the Retirement System's director, Dennis Ducker, and treasurer, Harlan E. Boyles (the defendants), unconstitutionally impaired his contractual rights in violation of the Contract Clause, U.S. Const., Art. I, § 10, para. 1, by imposing a limit on the amount of income he could earn without reducing the disability retirement benefits he was collecting due to a work related injury. The defendants appeal from the district court order declaring the Retirement System's cap on earnings for disability beneficiaries unconstitutional and enjoining its enforcement. *Kestler v. North Carolina Local Governmental Employees' Ret. Sys.*, 808 F.Supp. 1220 (W.D.N.C. 1992). We reverse.

The parties stipulated to many of the pertinent facts of this case. Kestler joined the Mecklenburg County Police Department in 1974 and became a participant in its retirement program, then known as the Law Enforcement Officers' Benefit and Retirement Fund (LEOBRF). Effective July 1, 1979, a police officer needed five years of creditable service in order to qualify for an unreduced retirement benefit at age 55 for members who were no longer law enforcement officers and who left their personal pension contributions in LEOBRF. 1979 Sess. Laws, C. 838, § 101, codified at N.C. Gen. Stat. 143-166(j) In § 102 of the same amendment, Section 143-166(y) was changed to provide that any officer:

> less than 55 years of age with five or more years of creditable service and who has been totally and permanently incapacitated for duty . . . may be retired . . . on a basic disability retirement allowance. . . .
>
> Under such rules and regulations as are otherwise adopted by the board of commissioners, a member eligible for a basic disability retirement allowance shall receive a disability retirement equal to one and fifty-five hundredths percent (1.55%) of his average final compensation calculated as the average annual compensation of a member during the four consecutive years of membership service producing the highest such average multiplied by the number of years of creditable service which he would have had if he had continued in service until his 55th birthday.
>
> The board of commissioners shall implement the provisions of this subsection by the adoption of necessary and reasonable rules and regulations.

Although this provision contains a statutory formula for determining disability benefit amounts, it did not contain any limitation on income earned in addition to any disability benefits received. Therefore, when

Kestler reached five years of service on August 16, 1979, he became eligible, if disabled, to apply for disability retirement benefits, on which at that time there was imposed no earnings cap.

On June 24, 1980, the North Carolina General Assembly enacted 1979 Sess. Laws C. 1215, which, in pertinent part, amended N.C. Gen. Stat. 143-166(y) to include a requirement that any police officer, who received disability retirement benefits and earned income that, added together, made a total of more than what his final compensation was as a police officer, forfeited any benefits in excess of that total compensation that were not paid for on account of the employee's own contributions. This earnings cap became effective on July 1, 1980 for employees retiring after that date. 1981 Sess. Laws. C. 975 § 1 slightly modified the C. 1215 earnings cap formula and made it applicable only to those officers who retired on disability benefits after July 1, 1981. In 1983, the name of the retirement system was changed to the Law Enforcement Officers' Retirement System (LEORS).[1]

Beginning on January 1, 1986, the General Assembly repealed § 143-166[2] and transferred all members of LEORS to the North Carolina Local Government Employees' Retirement System (Retirement System), codified at N.C. Gen. Stat. § 128-27 *et seq.*[3] The earnings cap remained the same after this transfer, because then and now, N.C. Gen. Stat. § 128-27(e)(1) which governed the Retirement System contained the same earnings cap as the replaced separate police retirement system.

In October of 1985, Kestler fell while chasing a burglary suspect and injured his knee so severely that he was approved for disability retirement benefits, effective March 1, 1986, and has remained unable to perform his law enforcement duties. However, Kestler could still maintain gainful employment and did so to supplement his disability benefits, but never made enough so that the earnings cap reduced his benefits. In 1990 he obtained employment that might cause him to exceed the earnings cap in 1991 with a corresponding reduction in his disability benefit amount. As a result, Kestler filed a declaratory judgment action on July 12, 1991, claiming, *inter alia*, that his interest in the disability plan was vested at the time the earnings cap became effective. He sought a determination that the earnings cap was an unconstitutional impairment of his contract in violation of the Contract Clause, U.S. Const., Art. I, § 10, para. 1, which provides that "No State shall . . . pass any . . . law impairing the obligation of contracts . . . ."[*]

---

[1] 1983 Sess. Laws, C. 468, § 1.

[2] See 1985 Sess. Laws, C. 479, § 196(7).

[3] This transfer is codified at N.C. Gen. Stat. § 143-166.50(b).

On December 16, 1992, the district court, on cross-motions for summary judgment, entered judgment for Kestler. It based its opinion on its finding that Kestler had a vested right in the retirement plan, *Kestler*, 808 F.Supp. at 1222, and enjoined Boyles, Ducker and any individual members of the Board of Trustees of the Retirement System from enforcing any earnings cap against Kestler on its reasoning that the earnings limitation placed on Kestler, after his rights in the Retirement System became vested, unconstitutionally impaired his contractual rights because he stood to suffer significant reductions in his retirement benefits. The district court also concluded that the statute of limitations had not run when Kestler filed his suit and that the reduction was not reasonable and necessary to serve an important public purpose. It reasoned that the earnings cap would affect his benefits in 1991, when his earned income would exceed the earnings cap. *Kestler*, 808 F.Supp. at 1224-5.

The defendants present three issues in this appeal: whether Kestler's complaint is barred by the statute of limitations, N.C. Gen. Stat. 1-52; whether a contractual right exists; and whether any such contractual right was impaired, or whether any impairment was nonetheless constitutional. We now reverse the district court's order in favor of Kestler on the basis of *Griffin v. Board of Comm'rs*, 352 S.E.2d 882 (N.C. Ct. App.), *rev. denied*, 356 S.E.2d 776 (N.C. 1987).[8]

---

[*] The complaint also contains a count (II) under the state constitution and statutes and a count (III) on breach of contract. The district court did not consider the breach of contract count (III), saying it was "ancillary to and indeed dependent upon" the § 1983 claim. Neither did it consider count II.

Initially, we note that the issue of whether a contract right exists is governed by state law, while federal law governs a determination that a contract has been impaired under the Contract Clause. *See Koch v. Yunich*, 533 F.2d 80, 86 (2nd Cir. 1976); *Baker v. Baltimore County, Md.*, 487 F.Supp. 461 (D. Md. 1980), *aff'd*, (table) 660 F.2d 488 (4th Cir. 1981).

The questions involved in this case have been considered directly in only one case in North Carolina. It is *Griffin v. Law Enf. Officers Ben. & Ret. Fund*, 352 S.E.2d 182 (N.C. Ct. App. 1987).

In *Griffin*, an officer of Mecklenburg County fell while on duty and sustained an injury to his shoulder in February, 1979. He returned to work but continued to have problems with the shoulder, which ultimately required surgery and caused his inability to work from time to time. After a second surgery on the shoulder in December of 1980, he did not work and applied for disability retirement on June 15, 1981. He was granted that disability retirement, effective September 1, 1981 by a letter dated September 11, 1981.

At the time the disability program was instituted, in 1979, there would have been no limit on Griffin's disability benefits, had he been eligible, which depended on his earnings. But on June 24, 1980, the General Assembly amended G.S. 143-166(y) to require disability retirement benefits to be reduced so that the sum of the employee's earnings and his disability benefits could not exceed what would have been his retirement benefits under more ordinary circumstances. Any difference was made up by reducing the retirement benefits from the part not paid for by the employee. Griffin claimed that the amendment could "not apply to him because his retirement rights had vested before those provisions were enacted, and that if the provisions are interpreted to affect his benefits, they are unconstitutional." 352 S.E.2d at 883. The court held that the application of the amendment to G.S. 143-166(y) was expressly determined by the retirement date of each employee and that "his rights were established not by his condition at a certain time, which is debatable, but by the date of his retirement which is not." *Griffin*, 352 S.E.2d at 884. The court then held that the defendant's rights had not vested until he retired. It stated "We know of no authority for the proposition that plaintiff's retirement rights vested before then." *Griffin*, 352 S.E.2d at 884.

---

[8] We hold that there was no impairment of a contract because Kestler's rights had not vested until he retired. Thus we do not consider the other questions raised by the defendants on appeal.

The next case was *Simpson v. Government Emp. Retire. Sys.*, 363 S.E.2d 90 (N.C. Ct. App. 1987), which involved a similar, but not the same, question for two employees who had been employed for more than five years prior to the time they qualified for disability benefits. They took the disability benefits and then sued because there was a difference in the statutory method of computing them which had existed at the conclusion of five years' service and the method existing at the time of retirement. The case did not involve any earnings' cap, as did the *Griffin* case. The court held without explanation that their right to retirement benefits vested after five years of creditable service under G.S. 128-27(a)(1) and (c). *Simpson*, 363 S.E.2d 90, 91, n.2. The method of computation of their disability retirement on the fifth anniversary of their employment would have resulted in greater benefits than that which resulted after an amendment to chapter 128 of the statute, effective July 1, 1982. Both of the employees had become qualified by disability for disability benefits subsequent to July 1, 1982. However, had their physical condition enabled them to qualify earlier, they would have received a greater monthly payment.

Because the court held that these employees' rights to benefits had vested prior to the time the statute was amended, it held that their rights under the Contract Clause had been impaired. The court remanded the case to the trial court to ascertain whether or not the changes were reasonable and necessary to serve an important state interest under *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977).

The court did not explain any difference between its holding and that of *Griffin* and only stated that the State claimed that *Griffin* stood for the proposition that the General Assembly could make changes in vested rights. Of course, that claim was rejected by necessary implication, and, indeed, *Griffin* does not make such a holding.

As those cases apply to this action, *Griffin* is directly on point.[8] The court held that Griffin's rights did not vest until the date of his disability retirement, so Kestler's rights did not vest until his disability retirement, March 1, 1986. Kestler, having no vested right in retirement, then, so far as he was concerned, the legislative change of June 24, 1980, as later made effective to him, effective July 1, 1981, could have been made at any time prior to his retirement without reference to him and without violation of any contractual rights he may have had with the State under the Contract Clause of the Constitution. We are thus of opinion that Kestler has no claim under the contract clause because he did not have a vested right at the time this legislative change was made and became effective as to him. Any right he may have had was not vested until his disability retirement, March 1, 1986.

It is apparent from reading *Griffin* and *Simpson* that the holdings of those two cases may be inconsistent, but this seems less likely in view of the fact that one of the judges on the panel in each of those cases was the same. When we remember that *Simpson* did not explicitly overrule *Griffin*, nor even criticize the decision, of more force is the statement with respect to overruling by implication made by the Supreme Court of North Carolina in *Cole v. Cole*, 51 S.E.2d 491, 494 (N.C. 1949):

---

[8] The district court, in choosing to follow the *Simpson* case rather than the *Griffin* case, explained that, "[n]owhere in *Griffin* does it reveal how long the plaintiff had been in service prior to the imposition of the earnings cap. Furthermore, . . . the plaintiff in *Griffin* did not . . . argue that the earnings cap violated the contract clause." *Kestler*, 808 F. Supp. at 1226. A review of the record in the *Griffin* case reveals that Griffin was employed by Mecklenburg County as a police officer "[f]or approximately 12 years prior to December 31, 1980." Complaint, *Griffin v. Board of Comm'rs of LEOBRF*, No. 84CVS918, record, at p.2. Also, the plaintiff's memorandum of law found in the record at p.71 argues both due process and contract clause violations. Thus, the court in *Griffin* was presented with very nearly the precise factual circumstances with which we are faced in the instant case. Moreover, we find it irrelevant whether Griffin sued for violations of his Due Process rights or his Contract Clause rights, because in either event, the *Griffin* court found that disability benefits vest upon retirement and not upon the completion of the five-year period of employment.

> A subsequent decision cannot, by mere implication, be held to overrule a prior case unless the principle is directly involved and the inference clear and impelling.

While the principles involved in *Griffin* and *Simpson* are similar, they are not the same. Neither is there any inference in *Simpson* that it overrules *Griffin*, clear or impelling or otherwise. With those thoughts in mind, we are of opinion that we should follow *Griffin*, a case on facts so similar to the case at hand as to be indistinguishable.

The order of the district court appealed from must be reversed and the case remanded for action not inconsistent with this opinion.

REVERSED AND REMANDED[7]

HALL, Circuit Judge, dissenting:

On August 16, 1979, Kestler celebrated his fifth anniversary on the police force, and the retirement plan did not include an earnings cap. The cap was added in 1980, and he retired on disability in 1986. The majority and I agree that events subsequent to "vesting" could not decrease Kestler's level of benefits; the only issue before us is whether, under North Carolina law, Kestler's benefits "vested" in 1979 or 1986. The majority relies solely on *Griffin*, whose facts parallel those in Kestler's case, in holding that the vesting occurred on retirement. *Griffin*, however, is in direct conflict with *Simpson*, and it is the latter case that dictates a ruling in Kestler's favor in this appeal. I respectfully dissent.

---

[7] The district court held the statute of limitations had not run, but because of our disposition we have not decided that question. We note, however, that in two subsequent cases on facts apparently indistinguishable from *Simpson* the Court of Appeals held the statute of limitations had run. *Faulkenbury v. Retirement System*, 424 S.E.2d 420 (N.C. Ct. App. 1993), and *Woodard v. N.C. Local Gov. Emp. Ret. Sys.*, 424 S.E.2d 431 (N.C. Ct. App. 1993).

There simply is no way to reconcile the holdings in *Griffin*[1] and *Simpson*.[2] Although noting that "[w]hile the principles involved in *Griffin* and *Simpson* are similar, they are not the same. . . ," *ante* at 9, the majority fails to identify any differences beyond those in the factual settings. The principles involved are precisely the same, and the holdings are diametrically opposite. *Griffin* holds that a retiree receives the level of pension benefits calculated in accordance with the statute in existence at the time he actually begins to receive the benefits, *i.e.* at retirement, while *Simpson* holds that it is the computation method in effect when the employee has met the service requirements for future benefits, *i.e.* before retirement, that determines what level of benefits he will receive. Each panel designated the pivotal moment as the point of "vesting." The resolution of the appeal before us depends on the answer to a single question: Which case do we follow?

The opinions in *Griffin* and *Simpson* were written by different three-member panels[3] of North Carolina's intermediate appellate court. The majority cites *Cole* for the proposition that North Carolina requires a "clear and impelling inference" that an earlier case directly involving the same principle is being implicitly overruled.[4] While the opinion in *Simpson* may not have provided a sufficiently clear inference, its core ruling, and not *Griffin's*, was upheld when the same principle arose again in the same court five years later.

In *Faulkenbury v. Teachers' and State Employees' Retirement System of N.C.*, 424 S.E.2d 420, 426 (N.C. Ct. App. 1993), the Court of Appeals cited *Simpson* for the proposition that "a statute that diminishes the calculated benefit of an employee impairs that employee's contractual rights." As was the case in *Simpson* and *Griffin*, and is the

---

[1] *Griffin v. Law Enf. Officers Ben. & Ret. Fund*, 352 S.E.2d 182 (N.C. Ct. App.), *appeal dismissed and disc. rev. denied*, 356 S.E.2d 776 (N.C. 1987).

[2] *Simpson v. Government Emp. Ret. Sys.*, 363 S.E.2d 90 (N.C. Ct. App. 1987), *aff'd mem.*, 372 S.E.2d 559 (N.C. 1988).

[3] Judge Cozort sat on both panels but did not write either opinion.

[4] *Cole* was decided well before there was an intermediate appellate court in North Carolina. The Court of Appeals was created in 1967. 1967 Sess. Laws c. 108, s. 1 (codified at N.C. Gen. Stat. § 7A-16 (1969)).

BEST AVAI

case in this appeal, the statutory diminution of benefits occurred after the *Faulkenbury* plaintiffs had met the service requirements for "vesting" but before they had actually retired. The court held that the "plaintiffs had stated a valid claim for impairment of obligation of contract" under the first two prongs of the test set forth in *United States Trust Co. of N.Y. v. State of New Jersey*, 431 U.S. 1, 17-26 (1977).[8] 424 S.E.2d at 427. *Faulkenbury*, as the latest and clearest version of the Court of Appeals' view on the issue of vesting in the state employees retirement plan, states the rule in North Carolina with regard to the impairment issue in Kestler's case. *Griffin*, which reigned as precedent for eight months and was never heard of again except for a mention (while its holding was ignored) in the later *Simpson* opinion, is too slender a reed to support the majority's ruling. *Faulkenbury* is the law. I would, therefore, affirm the judgment of the district court.

---

[8] Under the *U.S. Trust* test, the court must ask the following questions: (1) Did the statute create a contractual obligation?; (2) Did the state legislature impair that obligation?; (3) Was the impairment "necessary and reasonable"? In *Faulkenbury*, the Court of Appeals held that the statutory change in benefits computation satisfied the first two prongs. The court did not, however, reach the "necessary and reasonable" issue.

AILABLE COPY

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 93-1123

FILED 4/28/95

ANTHONY EDWARD KESTLER,
Plaintiff-Appellee,
versus
BOARD OF TRUSTEES OF NORTH CAROLINA LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM, A BODY POLITIC AND CORPORATE; DENNIS DUCKER, DIRECTOR OF THE NORTH CAROLINA LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM (IN HIS OFFICIAL CAPACITY); HARLAN E. BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA AND CHAIRMAN OF THE NORTH CAROLINA LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM (in his official capacity),
Defendants-Appellants,
and
NORTH CAROLINA LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM, A CORPORATION; STATE OF NORTH CAROLINA,
Defendants.

ORDER

Upon a request for a poll of the court on the petition for rehearing en banc, Judges Hall and Michael voted to rehear the case en banc, while Judges Ervin, Russell, Widener, Murnaghan, Wilkinson, Wilkins, Niemeyer, Hamilton, Luttig, Williams and Motz voted against rehearing en banc.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing en banc shall be, and it hereby is, denied.

The panel is of the opinion that the petition for rehearing is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and it hereby is denied.

With the concurrence of Judge Russell.

/s/ H. E. Widener, Jr.
For the Court

Judge Hall dissents. He would grant rehearing for the reasons expressed in his dissenting opinion and affirm the judgment of the district court.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
C-C-91-221-MU

FILED DEC. 16, 1992
U.S. DISTRICT COURT
W. DIST. OF N.C.

ANTHONY EDWARD KESTLER
Plaintiff

vs.

NORTH CAROLINA LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM, a corporation; BOARD OF TRUSTEES OF THE NORTH CAROLINA LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM, a body politic and corporate; DENNIS DUCKER, Director of the North Carolina Local Governmental Employees' Retirement System (in his official capacity); HARLAN E. BOYLES, Treasurer of the State of North Carolina and Chairman of the Board of Trustees for the North Carolina Local Governmental Employees' Retirement System (in his official capacity), and THE STATE OF NORTH CAROLINA.
Defendants.

JUDGMENT

For the reasons given in the Opinion filed contemporaneously with this Judgment,

IT IS THE JUDGMENT OF THIS COURT that the defendants Boyles and Ducker, as well as the individual members of the Board of Trustees of the North Carolina Local

Governmental Employees' Retirement System, are hereby enjoined from enforcing any earnings cap against the plaintiff.

This 16th day of December, 1992.

/s/ Graham C. Mullen
GRAHAM C. MULLEN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
C-C-91-221-MU

FILED DEC. 16, 1992
U.S. DISTRICT COURT
W. DIST. OF N.C.

ANTHONY EDWARD KESTLER
Plaintiff

vs.

NORTH CAROLINA LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM, a corporation; BOARD OF TRUSTEES OF THE NORTH CAROLINA LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM, a body politic and corporate; DENNIS DUCKER, Director of the North Carolina Local Governmental Employees' Retirement System (in his official capacity); HARLAN E. BOYLES, Treasurer of the State of North Carolina and Chairman of the Board of Trustees for the North Carolina Local Governmental Employees' Retirement System (in his official capacity), and THE STATE OF NORTH CAROLINA.
Defendants.

OPINION

THIS MATTER COMING ON TO BE HEARD AND BEING HEARD before the undersigned, the Honorable Graham C. Mullen, judge presiding over the October 1992 term of Federal District Court for the Western District of North Carolina, upon the plaintiff's Complaint and Petition for Declaratory Judgment. It appearing to the

Court that the plaintiff filed his Complaint and Petition for Declaratory Judgment on July 12, 1991 and therein alleged that certain limitations placed on his disability income as a former Mecklenburg County Police Officer are unconstitutional and constitute a breach of contract. The plaintiff seeks prospective injunctive relief against the State of North Carolina pursuant to 42 U.S.C. §1983.

The primary issue before the Court is whether the imposition of an earnings cap in a disability pension plan after the beneficiary vested in said plan violated the United States Constitution.

The plaintiff is represented by Fred W. DeVore, III and the defendants are represented by Alexander McC. Peters of the Office of the North Carolina Attorney General.

The parties have entered into certain stipulations which have been made a part of the record and which are undisputed. Based upon those stipulations, the Court makes the following Findings of Fact:

FINDINGS OF FACT

1. This is an action brought by a former Mecklenburg County Police Officer for a determination of his disability retirement rights.

2. The plaintiff Anthony Edward Kestler joined the Mecklenburg County Police Department on August 19, 1974.

3. As a county police officer he became a participant in a disability retirement plan known as the "Law Enforcement Officers' Benefit and Retirement Fund" (hereinafter known as "Retirement Plan").

4. The Retirement Plan benefits were established by N.C. Gen. Stat. §143-166 et. seq.

5. Under the Retirement Plan as it existed in 1973, before becoming eligible for disability Officer Kestler had to either have been an employee for ten years with five years membership in the retirement fund or become disabled on the job due to an incident which occurred after a year of full time service.

6. In 1979 the General Assembly amended the Retirement Plan by lowering the service requirement for disability from ten years to five years.

7. At the time he vested in the Retirement Plan, N.C. Gen. Stat. §143-166(y) read, in pertinent part, that an eligible employee, that is, one who suffered total and permanent disability and who filed an application for disability more than a year after the onset of his disability, shall:

> receive a basic disability retirement allowance equal to one and fifty-five one-hundredths percent (1.55%) of his average final compensation multiplied by the number of

> years of creditable service which he would have had if he had continued in service until his fifty-fifth birthday. Average final compensation shall mean the average annual compensation of a member during the four consecutive years of membership service (48 consecutive employment months) that produce the highest average annual compensation.

8. Under the 1979 amendment, effective July 1, 1979, Officer Kestler vested after five years of service on August 16, 1979.

9. Prior to July 1, 1980, the Retirement Plan did not have a limitation on the earnings a disabled police officer could earn without having his disability retirement benefits reduced.

10. In 1980 the state legislature amended the statute governing the Retirement Plan, N.C. Gen. Stat. §143-166(y), by placing a limitation on the earnings a disabled police officer could earn in a non-state law enforcement occupation and still receive disability benefits.

11. In 1981 the state legislature passed legislation to exclude disabled retirees who retired prior to July 1, 1981 from the earnings limitation.

12. In 1983 the Retirement Plan became the Law Enforcement Officers'

Retirement System, but the provisions of the Retirement Plan did not change.

13. In October 1985 while on duty Officer Kestler was called to investigate a burglary. During his investigation he gave chase on foot to a suspect. During the chase Officer Kestler fell, severely injured his knee, and was unable to return to law enforcement duties.

14. In 1985, effective January 1, 1986, the Law Enforcement Officers' Retirement System was terminated and N.C. Gen. Stat. §143-166, _et_. _seq_. was repealed. The liabilities, obligations and functions under the Retirement Plan were transferred to the North Carolina Local Governmental Employees' Retirement System (hereinafter known as the "System"). The System was and is governed by N.C. Gen. Stat. §128-27, _et_. _seq_. The System became the assignee of the disability retirement plan in which the plaintiff was enrolled. The earnings cap placed on disabled employees under the prior Retirement Plan before it was terminated is identical to the earnings cap found in the System.

15. On or about March 1, 1986, Officer Kestler was declared permanently disabled from law enforcement work by the State Retirement Medical Board. Since that time he has received disability benefits.

16. After becoming disabled, Officer Kestler has worked on a part time or full time basis in an effort to supplement his disability income. However, from the time

of his injury until 1991, he has not earned more than the earnings cap placed on him by the challenged statutes.

17. In late 1990, Anthony Kestler was hired by Midwest Security to provide security for the federal courthouse on a contract basis. For the first time since his disability he earned more than allowed by the earnings cap and thus will receive reduced disability benefits.

The Court further adopts the stipulations submitted by the parties as Findings of Fact and hereby incorporates them by reference.

The Court is aware of the fact that there is litigation pending before the North Carolina Court of Appeals which may provide definitive guidance as to North Carolina law on some of the issues presented in the case before this Court. Ordinarily, the concepts of comity and federalism would require that this Court await the decision of the North Carolina Court of Appeals. Several opinion dates have passed, however, without an opinion being issued on those cases. As the Court feels that the parties are entitled to have this matter resolved, the Court issues this decision. The Court feels compelled to note that circumstances of this case only serve to highlight the need for a referral mechanism. After listening to arguments of counsel and considering the legal authority submitted by the parties, the Court makes the following Conclusions of Law:

CONCLUSIONS OF LAW

1. Defendants argue that plaintiff's claims are barred by the Eleventh Amendment. The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend XI.

2. While the language of the Amendment expressly applies only to suits against a state by citizens of another state, the Supreme Court has long held that the Eleventh Amendment also bars suits against a state by citizens of that state. Papasan v. Allain, 478 U.S. 265, 276 (1986). "[I]n the absence of consent a suit in which the State or one of its agencies or departments is named as the defendants is proscribed by the Eleventh Amendment." Id. (quoting Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 100 (1985)). To determine whether an entity such as the System is an agency of the state and thus protected by Eleventh Amendment immunity, it becomes necessary to look to North Carolina law. See Huber, Hunt & Nichols v. Architectural Stone Co., 625 F.2d 22, 24 (5th Cir. 1980). Under North Carolina law, it is clear to the Court that the System is considered a state agency or instrumentality. Stanley

v. Retirement and Health Benefits Div., 66 N.C. App. 122, 310 S.E.2d 637 (1984). Thus, both the State of North Carolina and the System are immune from suit in this Court by virtue of the Eleventh Amendment.

3. Defendants concede, however, that under the Eleventh Amendment, the plaintiff can make a claim for declaratory and prospective injunctive relief against defendants Ducker and Boyles in their official capacities. Ex parte Young, 209 U.S. 123 (1908). In Young, the Court held that if a state official enforces an unconstitutional state enactment, the official is stripped of his official character, and may be subject to suit in federal court. Id. at 159-60. Young, however, has only been applied in cases where a violation of federal law by a state official is ongoing. Papasan, 478 U.S. at 277-78. Furthermore, relief which serves to compensate a party injured in the past by the act of a state official violating federal law has been held to be barred by the Eleventh Amendment. Id. at 278. "On the other hand, relief that serves directly to bring an end to a present violation of federal law is not barred by the Eleventh Amendment even though accompanied by a substantial ancillary effect on the state treasury." Id. This Court finds that the type of relief sought by the plaintiff in the instant case, prospective injunctive relief to bring an end to an ongoing violation of federal law by state officials, is precisely the type of relief permitted under Young, and is thus not barred by the Eleventh Amendment.

4. As to the defendant Board of Trustees of the System, this Court finds that the Eleventh Amendment does not bar prospective injunctive relief. While the plaintiff has named the Board of Trustees of the System as a defendant in this lawsuit, it is clear that he seeks to obtain injunctive relief against the individual officials who compose the Board of Trustees in their official capacities. While the Board of Trustees, as an agency or instrumentality of the state, cannot itself be sued, it is clear that its members can be sued in their official capacity for injunctive relief pursuant to Young. It would be a glorification of form over substance to require the plaintiff to name the Board members individually so as to elude the jurisdictional bar of the Eleventh Amendment. See Arthur v. Nyquist, 573 F.2d 134, 138-39 (2d Cir. 1978), cert. denied, 439 U.S. 860; Adamian v. Univ. of Nevada, 359 F.Supp. 825 (D. Nevada 1973), rev'd on other grounds, 523 F.2d 929 (9th Cir. 1975).

5. Notwithstanding any Eleventh Amendment concerns, defendants also contend that the defendants are not "persons" for purposes of liability under 42 U.S.C. §1983. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or

> other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C.A. §1983 (1981).

In Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989), the Supreme Court held that a state is not a person within the meaning of §1983. Will, 491 U.S. at 63. It is thus clear that the defendant State of North Carolina is not subject to liability under §1983.

6. Similarly, the suit against the System is essentially treated as a suit against the state, and, as such, it is also barred, as it is not a person under §1983.

7. Defendants again concede that defendants Ducker and Boyles can be subject to suit in their official capacities for declaratory and injunctive relief under §1983. Will, 109 S.Ct. at 2311 n.10.

8. The Board of Trustees, can also be property sued under §1983. The Board is composed of persons who, in their official capacities, administer the System. As explained above, injunctive relief should not be barred against a plaintiff who has, for whatever reason,

chosen not to name each member of the Board of Trustees individually in the complaint.

9. The plaintiff's claim that the defendants have violated his rights under the North Carolina Constitution is barred by the Eleventh Amendment. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984).

10. In addition to the Eleventh Amendment and §1983 defenses, the defendants argue that the plaintiff's claim is time barred, as the statutory amendment in question became effective on July 1, 1980, and the plaintiff did not file this lawsuit until 1991. The three-year limitation period established by N.C. Gen. Stat. §1-52 applies to this §1983 claim. See Wilson v. Garcia, 471 U.S. 261 (1985). Defendants argue that the statute of limitations began to run, at the latest, in April of 1987, when the plaintiff was for the first time required to report his previous year's earnings to the Local Retirement System pursuant to N.C. Gen. Stat. §128-27(e)(4). Defendants contend that when the plaintiff was first required to make this report, he was in possession of facts from which he could ascertain whether his alleged vested rights to receive benefits had been violated. Plaintiff points out, however, that if he had brought this lawsuit prior to the time when he was actually being paid above the earnings cap, the defendants would have successfully argued that the earnings cap, the defendants would have successfully argued that the lawsuit

be dismissed as not yet ripe for adjudication. In International Longshoremen's & Warehousemen's Union, Local 37 v. Boyd, 347 U.S. 222 (1954), the Supreme Court ruled that an action was not ripe when the plaintiffs "in effect asked the District Court to rule that a statute the sanctions of which had not been set in motion against individuals on whose behalf relief was sought, because an occasion for doing so had not arisen, would not be applied to them if in the future such a contingency should arise." Boyd, 347 U.S. at 224. Similarly, in the present case, the plaintiff could not have sued prior to 1991, for prior to that time, there was no way to determine that the amendment setting the earnings cap would even affect him in any way. Only when it became clear that he would exceed that earnings cap in 1991, did this lawsuit become ripe for adjudication. If the defendants' argument is followed, all officers participating in the System would have had to bring suit within three years after the amendment went into effect, incurring the expenses and burdens of litigation on the slight chance that they may one day become disabled and subsequently obtain employment in a job which offers earnings exceeding the cap. In the alternative, an officer who has become disabled would have to bring suit within three years after he first filed an earnings report with the Retirement System, on the chance that he may one day earn about the cap. Clearly, such lawsuits would be dismissed for lack of ripeness.

11. Defendants also argue that the plaintiff's claims are barred by the doctrine of laches. "The equitable doctrine of laches precludes the prosecution of stale causes of action if the party bringing the action lacks diligence." *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20 (4th Cir. 1991). The defendant has the burden of proving lack of diligence on the part of the plaintiff and resulting prejudice. *White v. Daniel*, 909 F.2d 99 (4th Cir. 1990), *cert*. *denied*, 111 S.Ct. 2916 (1991). Lack of diligence may be shown "either by proof that the action was not commenced within the applicable statute of limitations or by facts otherwise indicating a lack of vigilance." *Id*. at 102. Prejudice to the defendant "is demonstrated by a disadvantage on the part of the defendant in asserting or establishing a claimed right or some other harm caused by detrimental reliance on the plaintiff's conduct. *Id*. The defendants have failed to demonstrate to the Court any detrimental reliance or that they were prejudiced in any way. Furthermore the defendants have not shown a lack of vigilance on the part of the plaintiff. Thus, the Court finds that the plaintiff's claims are not barred by the doctrine of laches.

12. Article 1, Section 10, Clause 1 of the United States Constitution prohibits states from enacting any law impairing the obligation of contracts.

13. Plaintiff contends that because the earnings cap was imposed after his contractual benefit became vested, it

violates the contract clause of the United States Constitution. The issue before the Court is whether the plaintiff has an enforceable contractual right which has been unconstitutionally impaired by the state. The test for making this determination is set forth in United States Trust Co. v. New Jersey, 431 U.S. 1 (1977). A court must ascertain: (1) whether a contractual obligation is present, (2) whether the state's actions impaired that contract, and (3) whether the impairment was reasonable and necessary to serve an important public purpose. United States Trust Co., 431 U.S. 1 (1977).

14. The two cases cited by both parties regarding this issue are Griffin v. The Board of Commissioners of the Law Enforcement Officers' Benefit and Retirement Fund, 84 N.C. App. 443, 352 S.E.2d 882, appeal dismissed, 319 N.C. 672, 356 S.E.2d 776 (1987), and Simpson v. Governmental Employees Retirement System, 88 N.C. App. 218, 363 S.E.2d 90 (1987), aff'd per curiam, 323 N.C. 362,372 S.E.2d 559 (1988). The Griffin case, decided in 1987, would seem at first glance to be directly on point. In Griffin, a disabled Mecklenburg County police officer sued the Board of Commissioners of the Law Officer's Retirement Fund, alleging that the same statute in question in the present case did not apply to him because his retirement rights vested prior to the enactment of the provisions. The North Carolina Court of Appeals, in ruling against the plaintiff, stated that:

> [W]e see no basis for plaintiff's argument that applying the act to him violates his constitutional rights. The legislation that first reduced the benefits of future disability retirees who work and earn money was enacted in 1980, more than a year before the plaintiff retired, and we know of no authority for the proposition that plaintiff's retirement rights vested before then.

Griffin, 84 N.C. App. at 445, 352 S.E.2d at 884.

Nowhere in Griffin does it reveal how long the plaintiff had been in service prior to the imposition of the earnings cap. Furthermore, it should be noted that the plaintiff in Griffin did not allege a §1983 claim or argue that the earnings cap violated the Contract Clause.

In Simpson, decided almost a year later, the North Carolina Court of Appeals dealt with the specific issue of "whether the pension rights of vested members of the [System] may be made subject to adverse legislative modification without violation of [the Contract Clause]," labeling it "a case of first impression in North Carolina." Simpson, 99 N.C. App. at 219, 363 S.E.2d at 91. Thus, it is apparent that Griffin did not address the issue which is presented in both Simpson and in the present case. The Simpson case dealt with N.C. Gen. Stat. §128-27(4), which sets forth the method of calculating disability benefits under the System. After the fireman plaintiffs in Simpson became vested, the statute was modified so that the calculation resulted in a smaller retirement allowance for the plaintiffs. The plaintiffs in Simpson sought to have their benefits calculated according to the more favorable formula in effect at the time they became vested. The defendants made three arguments: (1) that Griffin stands for the proposition that the state can modify the disability retirement structure and apply the changes to vested members who have not yet retired on disability retirement at the time the changes came into effect, (2) that the state retains the power to modify or amend any of the provisions of the System, and (3) that even if there is a contract which has been impaired, that impairment is lawful because it is reasonable and necessary to serve an important public purpose. Id. at 221, 363 S.E.2d at 92.

After reviewing the law in other jurisdictions, the Simpson court specifically held that "the relationship between plaintiffs and the Retirement System is one of contract." Id. at 223, 363 S.E.2d at 93. The court noted that "[p]laintiffs, as members of [System], had a contractual right to rely on the terms of the retirement plan as these terms existed at the moment their retirement became vested." Id. at 224, 363 S.E.2d at 94. It should be noted that the court did not discuss the Griffin case at all, other than to note the defendants' reliance on it.

The defendants' attempts to distinguish Simpson are unconvincing. Applying the Simpson case, the Court finds that there is a contractual relationship.

15. Further, the Court finds that the earnings limitation placed on the plaintiff, after he became vested in the Retirement System, unconstitutionally impaired the contractual rights of the plaintiff inasmuch as the plaintiff stands to suffer significant reductions in his retirement benefits as a result of the legislative amendment under challenge.

16. Having found that the state's action impaired a contractual obligation, the next determination which this Court must make is whether the amendment was reasonable and necessary to serve an important public purpose. In Simpson, once the court found that a contract had existed and had been impaired, it went on to find that the issue of whether the amendment was reasonable and necessary to serve an important public purpose was not properly resolved in the court below. Id. at 225, 363 S.E.2d at 94. The defendants in Simpson, just like the defendants in the present case, argued that the challenged amendment was enacted primarily to correct inequities in the system. The court stated that it was "not persuaded that this explanation demonstrates or reflects that these changes were reasonable and necessary to serve an important state interest." Id. at 226, 363 S.E.2d at 95. There are two other cases since Simpson which have addressed the same issue: Faulkenbury v. Teachers' and State

Employees' Retirement System of North Carolina, et al., 90CVS12090 (Wake County), and Woodard, et al. v. North Carolina Local Government Employee's Retirement System, et al., 91CVS00368 (Wake County). In both of these cases, a superior court judge granted summary judgment in favor of the plaintiffs. The judge found that the change which was enacted to correct an inequity in the system was not reasonable and necessary.

The Faulkenbury and Woodard cases are currently on appeal, but a decision has yet to be rendered. The superior court's ruling in these cases directly addresses the argument that the defendants are making in the present case, that the amendment was made to correct an inequity. Thus, at this time, the status of the law in North Carolina is that an amendment that merely corrects an inequity is not considered reasonable and necessary to serve an important public purpose. Therefore, it is the conclusion of this Court that the defendants have failed to meet their burden of demonstrating that the amendment at issue was reasonable and necessary to serve an important public purpose.

17. Plaintiff's claim for breach of contract will not be discussed, as the Court finds that it is ancillary to and indeed dependent upon the plaintiff's §1983 claim.

THEREFORE, IT IS HEREBY ORDERED, **ADJUDGED AND DECREED** that to the extent that legislation enacted after the vesting of benefits by the plaintiff on August 16, 1976 in the Retirement Plan described above, its predecessors, successors and assigns, diminishes or restricts or limits the disability benefits that plaintiff would have received under the Retirement Plan in effect at the time he vested, said legislation is unconstitutional as violative of the Contract Clause of the United States Constitution.

IT IS FURTHER ORDERED that the defendants Boyles and Ducker, as well as the individual members of the Board of Trustees of the System, are hereby enjoined from enforcing any earnings cap against this plaintiff.

This 16th day of December, 1992.

/s/ Graham C. Mullen
Graham C. Mullen
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
C-C-91-221-MU

FILED MAY 4, 1992
U.S. DISTRICT COURT
W. DIST. OF N.C.

ANTHONY EDWARD KESTLER
Plaintiff

vs.

NORTH CAROLINA LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM, a corporation; BOARD OF TRUSTEES OF THE NORTH CAROLINA LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM, a body politic and corporate; DENNIS DUCKER, Director of the North Carolina Local Governmental Employees' Retirement System (in his official capacity); HARLAN E. BOYLES, Treasurer of the State of North Carolina and Chairman of the Board of Trustees for the North Carolina Local Governmental Employees' Retirement System (in his official capacity), and THE STATE OF NORTH CAROLINA.
Defendants

STIPULATIONS

For the purposes of clarifying the issues and to promote judicial economy, the parties to the above-captioned action stipulate to the following:

1. This is an action brought by a former Mecklenburg County Police Officer

for a determination of his disability retirement rights.

2. The primary issue before the Court is whether Plaintiff has an enforceable right to receive disability retirement benefits free of the earnings limitation imposed by statute in 1980. Necessary to the resolution of this primary issue will be the resolution of the following issues:

a. Whether this action is barred by the statute of limitations;

b. Whether Plaintiff has a contract right recognized by state law and enforceable by this court, and if so, whether that contract right has been impaired;

c. If this action is not barred by the statute of limitations, and if a recognizable and enforceable contract right has been impaired, whether such impairment was unconstitutional.

3. Anthony Edward Kestler joined the Mecklenburg County Police Department on August 19, 1974. As a law enforcement officer employed by the Mecklenburg County Police Department, he became a participant in a retirement plan known as the "Law Enforcement Officers' Benefit and Retirement Fund" (hereinafter known as "LEOBRF"). LEOBRF was created and governed by the provisions of N.C. Gen. Stat. §143-166 (1974) (attached hereto as

"Exhibit A" and incorporated herein by reference).

4. When Officer Kestler was hired, he was given a copy of the "Rules and Regulations of the Law Enforcement Officers' Benefit and Retirement Fund and the Separate Benefit Fund" (hereinafter referred to as the "1973 Regulations"). (Attached hereto as "Exhibit B" and incorporated herein by referenced.) These 1973 Regulations had been adopted by LEOBRF's Board of Commissioners pursuant to the authority granted in N.C. Gen. Stat. §143-166(i).

5. The requirements and prerequisites for disability retirement that existed at the time that Officer Kestler first became a member of LEOBRF were contained in §5(3) of the 1973 Regulations (Exhibit B, Page 18).

6. In 1975, a new edition of the "Rules and Regulations of the Law Enforcement Officers' Benefit and Retirement Fund" was issued (hereinafter referred to as the "1975 Regulations") (attached hereto as "Exhibit C" and incorporated herein by reference). The 1975 Regulations contained no amendments that substantially affect the issues in this case.

7. On June 7, 1979, the North Carolina General Assembly ratified 1979 Sess. Laws, C. 838 (hereinafter referred to as "Chapter 838"), which included some amendments to the provisions of N.C. Gen. Stat. §143-166 (relevant sections of which

are attached hereto as "Exhibit D" and incorporated herein by reference). Among these amendments were that section 101 of Chapter 838 reduced the minimum number of years of creditable service required for an unreduced retirement benefit at age 55 to five years for members who were no longer law enforcement officers and who left their contributions in LEOBRF. Also, section 102 of Chapter 838 lowered the creditable service requirement for disability retirement from ten years to five years. Under Chapter 838, the relevant provisions of which were effective July 1, 1979, Officer Kestler obtained the necessary years of creditable service to be eligible to apply for disability retirement on August 16, 1979, six weeks after the effective date of the changes.

8. Prior to July 1, 1980, neither the 1973 Regulations or the 1975 Regulations, nor the governing statute, N.C. Gen. Stat. §143-166(y), placed a limitation on the earnings a disabled police officer could earn in a non law enforcement occupation without having his disability retirement benefits reduced.

9. On June 14, 1980, the North Carolina General Assembly enacted 1979 Sess. Laws (2nd Sess. 1980), C. 1215, (attached hereto as "Exhibit E" and incorporated herein by reference, and herein-after referred to as "Chapter 1215"), with an effective date of July 1, 1980, for employees retiring on or after July 1, 1980, and of July 1, 1991, for employees who had retired prior to July 1, 1980. Chapter 1215 placed a limitation on

the earnings from gainful employment that a recipient of disability retirement benefits could receive without forfeiting part or all of that portion of his disability benefits not funded by his own contributions.

10. On October 8, 1981, the North Carolina General Assembly enacted 1981 Sess. Laws, C. 975, (attached hereto as "Exhibit F" and incorporated herein by referenced, and hereinafter referred to as "Chapter 975"), to be effective upon ratification. Section 1 of Chapter 975, among other things, made the earnings limitation enacted by Chapter 1215 applicable only to those who retired after July 1, 1981, and also amended the formula for calculating the earnings limitation in a manner that allowed for greater earnings from gainful employment.

11. The earnings limitation originally imposed by Chapter 1215, essentially provides, as amended by Chapter 975 and as in effect at the present time, that if a recipient of disability retirement benefits engages in a gainful occupation for which he is paid more than the difference between his disability retirement allowance and his final gross compensation, as that term is defined and calculated by statute, then the portion of his disability benefit that is not produced by the disability retiree's contributions is to be reduced by the amount necessary to make the sum of his disability retirement benefits and his earnings equal to his final gross compen-sation. In other words, if his disability retirement

benefits and earnings together exceed his final compensation, then his disability retirement benefit is reduced by an amount equal to the amount of the excess.

12. On July 8, 1983, the North Carolina General Assembly enacted 1983 Sess. Laws, C. 468, (relevant portions of which are attached hereto as "Exhibit G" and incorporated herein by reference, and which is hereinafter referred to as "Chapter 468"), to be effective on the date of ratification. Section 1 of Chapter 468 changed the name of LEOBRF to "The Law Enforcement Officers' Retirement System" (hereinafter referred to as "LEORS").

13. On June 27, 1985, the North Carolina General Assembly enacted 1985 Sess. Laws, C. 479 (relevant portions of which are attached hereto as "Exhibit H" and incorporated herein by reference, and which is hereinafter referred to as "Chapter 479"). Section 196 of Chapter 479 provided, in part, that, effective January 1, 1986, the statutory provisions governing LEORS (N.C. Gen. Stat. §143-166 _et seq_.) were repealed, and all law enforcement officers employed by local governmental agencies were as of that date members of the North Carolina Local Governmental Employees' Retirement System (hereinafter referred to as "NCLGERS"). Pursuant to Chapter 479, section 196(u), various assets of LEORS were transferred to NCLGERS.

14. NCLGERS was and is governed by N.C. Gen. Stat. §128-27, _et seq_. The

earnings limitation placed on recipients of disability retirement benefits under LEORS immediately before it was terminated was identical to the earnings cap found in NCLGERS, which was and is set forth in N.C. Gen. Stat. §128-27(e)(1) (attached hereto as "Exhibit I" and incorporated herein by reference).

15. In October, 1985, while on duty, Officer Kestler was called to investigate a burglary. During his investigation he gave chase on foot to a suspect. During the chase, Officer Kestler fell, severely injuring his knee. He was unable to return to work with the police department as a result of that injury.

16. On or about February 18, 1986, Officer Kestler was declared permanently and totally incapacitated for the further performance of duty as a law enforcement officer with the Mecklenburg County Police Department and was approved for disability retirement effective March 1, 1986, by NCLGERS's Medical Board. Officer Kestler has remained disabled since the date of his injury. During this time he has received disability retirement benefits from NCLGERS.

17. Since his disability, Officer Kestler has worked on a part time or full time basis in an effort to supplement his disability check. Since the time of his injury, he has not earned more than the earnings limitation placed on him by the applicable statutes.

18. In late 1990, Anthony Kestler was hired by Midwest Security to provide security for the federal courthouse on a contract basis. For the first time since the incurrence of his disability, he may earn more than allowed without penalty by the earnings limitation.

Respectfully submitted, this 1 day of April, 1992.

/s/ Fred W. DeVore, III
Fred W. DeVore, III
Attorney for Plaintiff
DEVORE AND ACTON
301 S. McDowell St, Ste 811
Charlotte, NC 28204
(704) 377-5242

/s/ Alexander McC. Peters
Assistant Attorney General
Attorney for Defendants
Attorney General's Office
Post Office Box 629
Raleigh, NC 27602-0629

EXHIBIT A

G.S. 143-166 (1974)

Below are relevant portions of Exhibit A which was attached to the original stipulations.

§ 143-166. Law-Enforcement Officers' Benefit and Retirement Fund.

. . . (b) For the purpose of determining the recipients of benefits under this section and the amounts thereof to be disbursed and for formulating and making such rules and regulations as may be essential for the equitable and impartial distribution of such benefits to and among the persons entitled to such benefits, there is hereby created a board to be known as "The Board of Commissioners of the Law-Enforcement Officers' Benefit and Retirement Fund," which shall consist of the State Auditor, who shall be chairman ex officio of said Board, the State Treasurer, the State Insurance Commissioner, and four members to be appointed by the Governor and to serve at his will, one of whom shall be a sheriff, one a police officer, one from the group of law-enforcement officers as hereinafter defined, employed by the State, and one representing the public at large. . . .

. . . (d) The said Board of Commissioners shall have control of all payments to be made from such fund. It shall hear and decide all applications for compensation and for retirement benefits created and allowed under this Article, and shall have power to make all necessary rules and regulations for its administration and government, and for the employees in the property discharge of their duties; it shall have the power to make decisions on applications for compensation or retirement benefits and its decision thereon shall be final and conclusive and not subject to review or reversal, except by the Board itself. . . .

. . . (i) The Board of Commissioners herein created shall have power and authority to promulgate rules and regulations and to set up standards under and by which it may determine the eligibility of officers for benefits under this Article, payable to peace officers who may be killed or become seriously incapacitated while in the discharge of their duty; such rules, regulations and standards shall include the amount of the benefits to be paid to the recipient in case of incapacity to perform his duty, as well as the amount to be paid such officer's dependents in case such officer is killed while in the discharge of his duty. The said Board is also authorized to promulgate rules and regulations and set up standards under and by which officers may be eligible for retirement and to determine the amounts to be paid such officers as retirement benefits after it has been determined by the Board that such officers are so eligible.

In order for an officer to be eligible for retirement benefits under this Article, he shall voluntarily pay into the fund herein created a percentage of his monthly salary, which percentage shall be determined by the said Board: Provided, that any officer so voluntarily contributing to the fund herein created, who has become incapacitated in the line of duty, shall not be required to contribute to the fund during the period of his disability. . . .

. . . (j) All officers who have contributed to the retirement fund herein provided for, and who have at least 15 years of membership service in the fund, shall be eligible for retirement benefits. . . .

. . . (l) No officers as herein defined shall be eligible to the retirement benefits herein provided for until the expiration of five years from the date of the ratification of this Article. . . .

EXHIBIT B

The Rules and Regulations of the Law Enforcement Officers' Benefit and Retirement Fund (1973)

Below are relevant portions of Exhibit B which was attached to the original stipulations.

. . .

BASIC DISABILITY RETIREMENT ALLOWANCE

(3) Upon the application of a member in service as an officer who has had 10 or more years of creditable service including at least five years of membership service, or upon the application of an active member who has completed one year of membership service and who has been totally and permanently incapacitated for duty as the nature and proximate result of an accident occurring while in the actual performance of duty at some definite time and place, provided such application is made not more than one year subsequent to the disabling accident or, if in receipt of compensation from the employer for more than one year following such accident, within 30 days after the cessation of such compensation, he may be retired by the Board on a basic disability retirement

allowance not less than 30 nor more than 90 days next following the execution and filing of such application, provided that the physician or physicians, appointed by the Board, after evaluating all essential statements and certificates pertaining to at least two medical examinations of such member, shall certify that he is mentally or physically totally incapacitated for the further performance of duty, that such incapacity is likely to be permanent, and that such member should be retired. . . .

EXHIBIT C

The Rules and Regulations of the Law Enforcement Officers' Benefit and Retirement Fund (1975)

There are no relevant portions of Exhibit C, which was attached to the original stipulations.

EXHIBIT D

1979 Sess. Laws, C. 838, ss. 101-2

Below are relevant portions of Exhibit D which was attached to the original stipulations.

. . .

REDUCE VESTING PERIOD FOR DISABILITY BENEFIT ENTITLEMENT IN LAW ENFORCEMENT OFFICERS' BENEFIT AND RETIREMENT FUND.

Sec. 102. G.S. 143-166(y) is rewritten to read:

. . . Any member who is less than 55 years of age with five or more years of creditable service and who has been totally and permanently incapacitated for duty, or any member who is less than 55 years of age with one or more years of membership service and who has been totally and permanently incapacitated for duty as the nature and proximate result of an accident occurring while in the actual performance of duty at some definite time and place may, upon application of the member or his employer, be retired by the board of commissioners on a basic disability retirement allowance as is set forth below. . . .

EXHIBIT E

1979 Sess. Laws, (2nd Sess. 1980), C. 1215

Below are relevant portions of Exhibit D which was attached to the original stipulations.

S.B. 1008   CHAPTER 1215

AN ACT TO PROVIDE THE REDUCTION IN DISABILITY RETIREMENT BENEFITS TO REEMPLOYED MEMBERS OF THE LAW ENFORCEMENT OFFICERS BENEFIT AND RETIREMENT FUND OR MEMBERS WHOSE EARNING CAPACITY HAS IMPROVED.

The General Assembly of North Carolina enacts:

Section 1. G.S. 143-166(y) as it appears in the 1979 Supplement to Volume 3C of the General Statutes is amended by adding a new paragraph between the fourth and fifth paragraphs to read as follows:

"On or after July 1, 1980, should the Board of Commissioners determine that such disability beneficiary is engaged in or is able to engage in a gainful occupation paying more than the difference between the basic disability retirement allowance not provided by the member's contributions shall be reduced to an amount which

together with the portion of the basic disability retirement allowance provided by the member's contributions and the amount earnable by him, shall equal the amount of his average final compensation. Should his earning capacity be later changed, the portion of his basic disability retirement allowance not provided by the member's contributions may be further modified: Provided that the new allowance shall not exceed the allowance originally granted nor an amount which, when added to the amount earnable by the member together with the portion of the basic disability retirement allowance provided by the member's own contributions, equals his average final compensation."

Sec. 2. This act shall become effective on July 1, 1980, for employees retiring on or after July 1, 1980. For employees retiring prior to July 1, 1980, this act shall become effective on July 1, 1981. . . .

EXHIBIT F

1981 Sess. Laws, C. 975

Below are relevant portions of Exhibit F which was attached to the original stipulations.

S.B. 261 CHAPTER 975

AN ACT TO INDEX TO THE CONSUMER PRICE INDEX THE EARNABLE DIFFERENCE FOR DISABILITY BENEFICIARIES OF THE STATE ADMINISTERED RETIREMENT PROGRAMS.

The General Assembly of North Carolina enacts:

Section 1. G.S. 143-166(y) is amended by rewriting the sixth paragraph to read:

"On and after July 1, 1981, the Board of Commissioners shall determine whether a disability beneficiary who retired after July 1, 1981, is engaged in or is able to engage in a gainful occupation paying more than the difference, as hereinafter indexed, between his basic retirement allowance and the gross compensation earned as a law enforcement officer during the 12 consecutive months in the final 48 months of service prior to retirement producing the highest gross compensation, excluding any compensation received on account of termination. If the disability beneficiary is earning or is able to earn more than the difference, the portion of his basic disability retirement allowance not provided by his contributions shall be reduced to an amount which, together with the portion of the basic disability retirement allowance provided by his contributions and the amount earnable by him shall equal the amount of his gross compensation prior to retirement. . . .

EXHIBIT G

1983 Sess. Laws, C. 468

Below are relevant portions of Exhibit G which was attached to the original stipulations.

S.B. 293 CHAPTER 468

AN ACT TO AMEND THE LAWS GOVERNING THE LAW ENFORCEMENT OFFICERS' BENEFIT AND RETIREMENT FUND SO AS TO RECEIVE A FAVORABLE DETERMINATION AS A QUALIFIED TRUST BY THE INTERNAL REVENUE SERVICE AND TO THEN CAUSE A TAX SHELTERING FROM CURRENT INCOME OF MEMBERS' CONTRIBUTIONS.

The General Assembly of North Carolina enacts:

Section 1. G.S. 143-166 and G.S. 143-166.01 are amended by deleting the phrase "LAW ENFORCEMENT OFFICERS' BENEFIT AND RETIREMENT FUND" from the title and substituting in lieu thereof the phrase "LAW ENFORCEMENT OFFICERS' RETIREMENT SYSTEM"; by deleting the phrase "Law Enforcement Officers' Benefit and Retirement Fund" from the captions and substituting in lieu thereof the phrase "Law Enforcement Officers' Retirement System"; by deleting the phrase "Law-Enforcement Officers' Benefit and Retirement Fund" wherever it appears and substituting in lieu thereof the phrase "Law Enforcement Officers' Retirement System"; and by deleting the phrase "Retirement Fund" wherever it appears and substituting in lieu thereof the phrase "Retirement System".

Sec. 2. G.S. 143-166 and G.S. 143-166.01 are amended by deleting the phrase "Board of Commissioners" wherever it appears and by substituting in lieu thereof the phrase "Board of Trustees".

EXHIBIT H

1985 Sess. Laws, C. 479, s. 196

Below are relevant portions of Exhibit H which was attached to the original stipulations.

. . .

"On and after January 1, 1986, the creditable service of a member who was a member of the Law Enforcement Officers' Retirement System at the time of the transfer of law enforcement officer employed by participating employers from the System to this Retirement System and whose accumulated contributions are transferred from that System to this Retirement System, includes service that was creditable in the Law Enforcement Officers' Retirement System; and membership service with that System is membership service with this Retirement System; provided, notwithstanding any provisions of this Article to the contrary, any inchoate or accrued rights of such a member to purchase creditable service for military service, withdrawn service and prior service under the rules and regulations of the Law Enforcement Officers' Retirement System may not be diminished and may be purchased as creditable service with this Retirement System under the same conditions that would have otherwise applied.". . .

EXHIBIT I

G.S. 128-27(e)(1)

Below are relevant portions of Exhibit I which was attached to the original stipulations.

. . .

(e) . . .

. . . (1) The Board of Trustees shall determine whether a disability beneficiary is engaged in or is able to engage in a gainful occupation paying more than the difference, as hereinafter indexed, between his disability retirement allowance and the gross compensation earned as an employee during the 12 consecutive months in the final 48 months of service prior to retirement producing the highest gross compensation excluding any compensation received on account of termination. If the disability beneficiary is earning or is able to earn more than the difference, the portion of his disability retirement allowance not provided by his contributions shall be reduced to an amount which, together with the portion of the disability retirement allowance provided by his contributions and the amount earnable by him shall equal the amount of his gross compensation prior to retirement. . . .

The provisions of this subdivision shall not apply to beneficiaries of the Law Enforcement Officers' Retirement System transferred to this Retirement System who commenced retirement on and before July 1, 1981.

Supreme Court, U.S.
FILED
AUG 29 1995
OFFICE OF THE CLERK

②

No. 95-168

IN THE
Supreme Court of the United States
October Term, 1995

ANTHONY EDWARD KESTLER,
Petitioner,

v.

BOARD OF TRUSTEES OF THE NORTH CAROLINA LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM, *et al.*,
Respondents.

On Petition For Writ Of Certiorari
To The Fourth Circuit Court Of Appeals

BRIEF IN OPPOSITION

MICHAEL F. EASLEY
North Carolina Attorney General

Alexander McClure Peters
Special Deputy Attorney General
Counsel of Record
North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629
Telephone: (919) 733-6026

46pp

QUESTION PRESENTED

Whether the United States Court of Appeals for the Fourth Circuit properly applied the law of North Carolina in determining that Petitioner had no vested right to receive disability retirement benefits free of an earnings limitation prior to the enactment of legislative provisions imposing such a limitation.

THIS PAGE INTENTIONALLY LEFT BLANK

LIST OF PARTIES

A. Petitioner/Plaintiff: *Anthony Edward Kestler.*

B. Respondents/Defendants: *The Board of Trustees of the North Carolina Local Governmental Employees' Retirement System*, a body politic and corporate; *Dennis Ducker (in his official capacity)*, Director of the North Carolina Local Governmental Employees' Retirement System; and *Harlan E. Boyles (in his official capacity)*, Treasurer of the State of North Carolina and Chairman of the Board of Trustees of the North Carolina Local Governmental Employees' Retirement System.

C. Additional Defendants Dismissed By The United States District Court Who Were Not Parties To The Appeal Before The United States Court Of Appeals For The Fourth Circuit: *The North Carolina Local Governmental Employees' Retirement System*, an agency of the State of North Carolina;[*] and *The State of North Carolina.*

---

[*] Although Petitioner refers to the North Carolina Local Governmental Employees' Retirement System as "a corporation," the statute creating the Retirement System describes it as an entity having "the power and privileges of a corporation." N.C. GEN. STAT. § 128-22. The District Court properly determined that the Retirement System is an agency or instrumentality of the State of North Carolina. *Kestler v. North Carolina Local Governmental Employees' Retirement System*, 808 F. Supp. 1220, 1223 (W.D.N.C. 1992) (Petition A.22). Indeed, Kestler himself alleged that the Retirement System is an agency of the State of North Carolina (Complaint ¶ 4).

THIS PAGE INTENTIONALLY LEFT BLANK

TABLE OF CONTENTS

QUESTION PRESENTED i

LIST OF PARTIES iii

TABLE OF AUTHORITIES vii

STATEMENT OF THE CASE 2

A. Nature of the Case and Proceedings Below. 2

B. Factual Background. 3

REASONS WHY THE PETITION SHOULD BE DENIED 4

I. KESTLER HAS FAILED TO ESTABLISH THAT APPROPRIATE GROUNDS FOR GRANTING A PETITION FOR WRIT OF CERTIORARI EXIST IN THIS CASE. 4

II. THE COURT OF APPEALS FOR THE FOURTH CIRCUIT PROPERLY APPLIED NORTH CAROLINA CASE LAW IN ITS DECISION. 7

III. THE POSSIBLE PRECEDENTIAL EFFECT OF THE FOURTH CIRCUIT'S DECISION DOES NOT WARRANT THE GRANTING OF A PETITION FOR WRIT OF CERTIORARI. 11

CONCLUSION 12

APPENDIX

Griffin v. The Board of Commissioners of the Law Enforcement Officers' Benefit and Retirement Fund, 84 N.C. App. 443, 352 S.E.2d 882 (1987) 1a

Griffin v. The Board of Commissioners of the Law Enforcement Officers' Benefit and Retirement Fund, 319 N.C. 672, 352 S.E.2d 776 (1987) (denial of petition for discretionary review and dismissal of appeal) 7a

Simpson v. North Carolina Local Governmental Employees' Retirement System, 88 N.C. App. 218, 363 S.E.2d 90 (1987) . . . 9a

Simpson v. North Carolina Local Governmental Employees' Retirement System, 323 N.C. 362, 372 S.E.2d 559 (1988) (*Per curiam* affirmance) 23a

TABLE OF AUTHORITIES

CASES

Kestler v. Board of Trustees of the North Carolina Local Governmental Employees' Retirement System, 48 F.3d 800 (1995) 3, 5, 6, 8, 10

Bigham v. Foor, 201 N.C. 14, 158 S.E. 548 (1931) . . 8

Butner v. United States, 440 U.S. 48 (1979) 6

Cole v. Cole, 229 N.C. 757, 51 S.E.2d 491 (1949) . . 8

Faulkenbury v. Teachers' and State Employees' Retirement System, 108 N.C. App. 357, 424 S.E.2d 420 (1993) 2

Griffin v. Board of Commissioners of Law Enforcement Officers' Benefit and Retirement Fund, 84 N.C. App. 443, 352 S.E.2d 882, *appeal dismissed and pet. for disc. rev. denied*, 319 N.C. 672, 356 S.E.2d 776 (1987) 5, 7, 10

Huggard v. Wake County Hospital System, 102 N.C. App. 772, 403 S.E.2d 568 (1991) 12

In the Matter of Appeal from Civil Penalty, 324 N.C. 373, 379 S.E.2d 30 (1989) 8, 9

Kestler v. North Carolina Local Governmental Employees' Retirement System, 808 F. Supp. 1220 (W.D.N.C. 1992) 3

LaBroad v. The Teachers' and State Employees' Retirement System, 3:94CV210McK (W.D.N.C.) . . 11

Simpson v. Local Governmental Employees' Retirement System, 88 N.C. App. 218, 363 S.E.2d 90 (1987), *aff'd per curiam*, 323 N.C. 362, 372 S.E.2d 559 (1988) 5, 7

The Tungus v. Skovgaard, 358 U.S. 588 (1959) 6

United New York & New Jersey Pilots Assn. v. Halecki, 358 U.S. 613 (1959) 6

CONSTITUTIONAL PROVISIONS

U.S. CONST., art. I, § 10 5

STATUTES AND FEDERAL REGULATIONS

42 U.S.C. § 1983 . . . . 2, 3

1979 N.C. Sess. Laws (2nd. Sess. 1980) 1215 9

N.C. GEN. STAT. § 128-35 . . . . 3, 4

OTHER

Rules of the Supreme Court, Rule 10.1(a) 4

No. 95-168

In The
Supreme Court of the United States
October Term, 1995

ANTHONY EDWARD KESTLER,
Petitioner,

v.

BOARD OF TRUSTEES OF THE NORTH CAROLINA LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM, *et al.*,
Respondents.

On Petition For Writ Of Certiorari To The Fourth Circuit Court Of Appeals

---

BRIEF IN OPPOSITION

The Respondents, the Board of Trustees of the North Carolina Local Governmental Employees' Retirement System, Dennis Ducker, and Harlan E. Boyles, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the United States Court of Appeals for the Fourth Circuit's opinion in this case. That opinion is reported at 48 F.3d 800 (1995) (Petition A.1-A.11)

STATEMENT OF THE CASE

A. Nature of the Case and Proceedings Below.

Anthony Edward Kestler brought this action in the United States District Court for the Western District of North Carolina on July 12, 1991, seeking, *inter alia*, declaratory relief under 42 U.S.C. § 1983 and injunctive relief declaring the acts of the State of North Carolina and the several defendants violative of the United States Constitution in that they placed a limitation on the amount of outside earnings that plaintiff could receive without decreasing his disability benefits paid by defendant Board of Trustees (Complaint ¶¶ 3-25). Kestler claimed that this limitation could not be applied to him inasmuch as he was "vested" in the Retirement System prior to enactment of this limitation (*id.*)[1]

The defendants answered the complaint by denying that they had violated any constitutional right of Kestler's, by asserting various affirmative defenses, and by moving to dismiss the complaint on various procedural grounds (Answer ¶¶ 22, defenses 1-8).

On December 16, 1992, after a hearing on stipulated facts (*see* Petition A.35-A.58), the District Court, in an opinion reported at 808 F. Supp. 1220 (1992) (Petition A.16-A.34), ruled in favor of Kestler and enjoined defendants

---

[1] In his Petition, Kestler refers to the defendants as "fiduciaries." The Record contains no finding of a fiduciary relationship between Kestler and the defendants, and the North Carolina Court of Appeals has specifically questioned whether the relationship between Kestler and the defendants can be properly called fiduciaries. *See Faulkenbury v. Teachers' and State Employees' Retirement System*, 108 N.C. App. 357, 373, 424 S.E.2d 420, 428 (1993).

Ducker, Boyles, and the individual members of the Board of Trustees of the North Carolina Local Governmental Employees' Retirement System, in their official capacities, from enforcing the earnings limitation as to Kestler. In its opinion, the District Court concluded that the remaining defendants below -- the State of North Carolina and the North Carolina Local Governmental Employees' Retirement System -- were not "persons" subject to suit under 42 U.S.C. § 1983 (Petition A.22-A.23). The District Court also concluded that, while the Board of Trustees itself was not subject to suit, Kestler's complaint amounted to a suit against the individual members of the Board in their official capacity, making the individual members parties to this action (Petition A.24).

Defendants Ducker, Boyles, and Board of Trustees (hereinafter referred to, for the sake of clarity, simply as "defendants") appealed the decision of the District Court to the United States Court of Appeals for the Fourth Circuit. A divided panel of the Court of Appeals, by a decision reported at 48 F.3d 800 (1995) (Petition A.1-A.11), reversed the District Court and remanded the matter for dismissal of the complaint. The same divided panel denied Kestler's petition for rehearing, and the Fourth Circuit rejected Kestler's suggestion for rehearing *en banc* (Petition A.12-A.13).

B. Factual Background.

Defendants agree with Kestler's statement of the facts, except to the extent that his statement suggests that N.C. GEN. STAT. § 128-35 (*quoted at* Petition 2-3) obligates defendants to pay his disability retirement benefits without regard to the earnings limitation. By its own terms, N.C.

GEN. STAT. § 128-35 limits the North Carolina Local Governmental Employees' Retirement System's obligations to "pensions, annuities, retirement allowances, refunds and other benefits *granted under the provisions of this Article* [N.C. GEN. STAT. Chapter 128, Article 3, which creates and governs the Retirement System]" (emphasis added). Accordingly, N.C. GEN. STAT. § 128-35 itself confers no contractual rights.

REASONS WHY THE PETITION SHOULD BE DENIED

I. KESTLER HAS FAILED TO ESTABLISH THAT APPROPRIATE GROUNDS FOR GRANTING A PETITION FOR WRIT OF CERTIORARI EXIST IN THIS CASE.

In his petition, Kestler urges that a writ of certiorari should be granted because "the Fourth Circuit Court of Appeals decided a federal constitutional question of impairment by state statute of petitioner's retirement contract in a manner contrary to the court of last resort of the State of North Carolina" (Petition 5). By phrasing the issue in this way, it would appear that Kestler is attempting to bring his petition within the guidelines of Rule 10.1(a) of the Rules of the Supreme Court. Rule 10.1(a) provides that a writ of certiorari may be appropriate when a United States court of appeals "has decided a federal question in a way in conflict with a state court of last resort." By his petition, however, Kestler is not actually asking the Court to review a federal question. The issue that he presents is totally a question of North Carolina law.

Kestler alleges that his vested contractual rights have been impaired by defendants in violation of the Contract Clause, U.S. CONST., art. I, § 10, para. 1. As noted by the Fourth Circuit, "the issue of whether a contract right exists is governed by state law, while federal law governs a determination that a contract has been impaired under the Contract Clause." *Kestler v. Board of Trustees of the North Carolina Local Governmental Employees' Retirement System*, 48 F.3d 800, 803 (CA4 1995) (Petition A.6). The majority, relying on *Griffin v. Board of Commissioners of Law Enforcement Officers' Benefit and Retirement Fund*, 84 N.C. App. 443, 352 S.E.2d 882 (App., *infra*, 1a-5a), *appeal dismissed and pet. for disc. rev. denied*, 319 N.C. 672, 356 S.E.2d 776 (1987) (App., *infra*, 7a), determined that under North Carolina law, Kestler had no vested contractual right to receive disability retirement benefits free of any earnings limitation. Kestler contends that the majority should have relied on *Simpson v. Local Governmental Employees' Retirement System*, 88 N.C. App. 218, 363 S.E.2d 90 (1987) (App., *infra*, 9a-21a), *aff'd per curiam*, 323 N.C. 362, 372 S.E.2d 559 (1988) (App., *infra*, 23a-24a), in reaching its decision. It is the Fourth Circuit's interpretation and application of North Carolina law, then, and not the Fourth Circuit's disposition of a federal question, that Kestler seeks to have this Court review.

The Fourth Circuit considered Kestler's arguments carefully and thoroughly. Eight paragraphs and one long footnote, covering approximately four pages of an eight-and-one-half page majority opinion, are devoted to *Griffin*, *Simpson*, and a detailed analysis of which precedent is controlling in this case. *Kestler*, 48 F.3d at 803-804 (Petition A.6-A.9). The majority ultimately decided that, "[w]hile the principles involved in *Griffin* and *Simpson* are similar, they are not the same. Neither is there any inference in *Simpson* that it overrules *Griffin*, clear or impelling or otherwise." *Kestler*, 48 F.3d at 804 (Petition A.9).

Kestler now asks this Court to decide whether the North Carolina Supreme Court or the North Carolina Court of Appeals has overruled *Griffin*. This is purely a question of state, not federal, law. Historically, this Court has been understandably reluctant to undertake such reviews. In *Butner v. United States*, 440 U.S. 48 (1979), Justice Stevens, speaking for the Court, stated:

> In this Court the parties have argued the state-law question at great length, each stressing different aspects of the record. We decline to review the state-law question. The federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would dispose of comparable issues.

Id. at 57-58 (footnote omitted). *See also The Tungus v. Skovgaard*, 358 U.S. 588, 596 (1959) (in the absence of definitive statutory interpretation from state courts, the Court deferred to the Third Circuit's interpretation of New Jersey statute); *United New York & New Jersey Pilots Assn. v. Halecki*, 358 U.S. 613, 615 (1959) (same).

Because Kestler is seeking to have the Court determine a question of North Carolina law, his petition for writ of certiorari lacks appropriate grounds and should be denied.

II. THE COURT OF APPEALS FOR THE FOURTH CIRCUIT PROPERLY APPLIED NORTH CAROLINA CASE LAW IN ITS DECISION.

Kestler argues that the majority below mistakenly relied on the decision of the North Carolina Court of Appeals in *Griffin v. Board of Commissioners of Law Enforcement Officers' Benefit and Retirement Fund*, 84 N.C. App. 443, 352 S.E.2d 882 (App., *infra*, 1a-5a), *appeal dismissed and pet. for disc. rev. denied*, 319 N.C. 672, 356 S.E.2d 776 (1987) (App., *infra*, 7a). He contends that in deciding this case, the court was bound by the decision of the North Carolina Court of Appeals, affirmed in a *per curiam* decision by the North Carolina Supreme Court, in *Simpson v. Local Governmental Employees' Retirement System*, 88 N.C. App. 218, 363 S.E.2d 90 (1987) (App., *infra*, 9a-21a), *aff'd per curiam*, 323 N.C. 362, 372 S.E.2d 559 (1988) (App., *infra*, 23a-24a). Kestler's position in this regard is inaccurate, however, because the Fourth Circuit properly interpreted and applied the law of North Carolina.

Kestler makes numerous arguments that *Griffin* has been overruled by implication, that it has never been cited again as precedent, and that *Simpson*, through a *per curiam* affirmance, was a North Carolina Supreme Court decision, while *Griffin* was only a North Carolina Court of Appeals decision. Accordingly, he contends that *Simpson*, not *Griffin*, is controlling in this case. In making these arguments, Kestler ignores, and asks the Court to ignore, established principles of North Carolina law.

By its decision in *Simpson*, the North Carolina Court of Appeals did not overrule *Griffin*; indeed, it could not have done so. This is so for two reasons. First, as noted by the court below, *Kestler*, 48 F.3d at 804 (Petition A.8-A.9), overruling by implication is highly disfavored in North Carolina. *See Cole v. Cole*, 229 N.C. 757, 51 S.E.2d 491 (1949). More to the point, however, is the fact that one panel of the North Carolina Court of Appeals lacks the authority to overrule the decision of another panel of that court.

In *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989), the North Carolina Supreme Court specifically held that "a panel of the Court of Appeals is bound by a prior decision of another panel of the same court addressing the same question, but in a different case, unless overturned by an intervening decision from a higher court." *Id.*, 324 N.C. at 384, 379 S.E.2d at 37. This being the law in North Carolina, the panel of the Court of Appeals that decided *Simpson* was simply without authority to overrule the decision in *Griffin*. The *Griffin* and *Simpson* decisions are properly read, then, as the court below read them -- as two cases, both of which retain value as precedent, that deal with quite similar but ultimately distinguishable issues. *Kestler*, 48 F.3d at 804 (Petition A.9).

Nor does the decision of the North Carolina Supreme Court affirming *per curiam* the holding of the Court of Appeals in *Simpson* change the fact that *Simpson* did not overrule *Griffin*. While it is true that a *per curiam* opinion has the same precedential value as a full opinion rendered by the North Carolina Supreme Court, *see Bigham v. Foor*, 201 N.C. 14, 15, 158 S.E. 548, 549 (1931), it is also true that a *per curiam* affirmance does nothing but affirm, without comment, the holding of the North Carolina Court of

Appeals. In other words, the North Carolina Supreme Court does not add to or even comment upon the opinion of the Court of Appeals in a *per curiam* decision; it simply adopts as its own the disposition of the case made by the Court of Appeals. Accordingly, if the North Carolina Court of Appeals did not overrule *Griffin* in its *Simpson* decision (which, according to *In the Matter of Appeal from Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37, it lacked the authority to do), then neither did the North Carolina Supreme Court overrule *Griffin* in its *per curiam Simpson* affirmance.

Moreover, the court below correctly determined that *Griffin* and *Simpson* addressed similar but distinguishable issues. A cursory reading of the Court of Appeals' opinion in *Simpson* (App. 7a-19a) shows that the court was considering a legislative alteration of the statutory formula used to calculate disability benefits. (*See* App. 11a-13a) The statute at issue in this case, the earnings limitation imposed by 1979 N.C. Sess. Laws (2nd. Sess. 1980) 1215 (Petition A.50-A.51), was never at issue in *Simpson*. Moreover, the contractual "right" claimed by the *Simpson* plaintiffs was a "right" conferred by statute, not by administrative regulation as in this case. Simply put, the issue raised by Kestler in this case was not before the North Carolina courts in *Simpson*.

On the other hand, the statute at issue in this case is the same statute that was at issue in *Griffin*. In *Griffin*, the plaintiff, a member of the former Law Enforcement Officers' Benefit and Retirement Fund like Kestler, alleged that the imposition of the earnings limitation brought about by 1979 N.C. Sess. Laws (2nd. Sess. 1980) 1215, did "not apply to him because his retirement rights had vested before those provisions were enacted, and that if the provisions [were] interpreted to affect his benefits they are unconstitutional." *Id.* at 444, 352 S.E.2d at 883 (App., *infra*, 2a). The North Carolina Court of Appeals rejected this argument, holding that the plaintiff had no right to be free from the earnings limitation because the earnings limitation was in effect at the time that he actually retired on disability. "Thus, we see no basis for plaintiff's argument that applying the act to him violates his constitutional rights." *Id.* at 445, 352 S.E.2d at 884 (App., *infra*, 4a). Moreover, as the Fourth Circuit specifically noted, the record in *Griffin* establishes that the North Carolina Court of Appeals was in fact presented with arguments from the plaintiff concerning violations of the Contract Clause, enabling the Fourth Circuit to note that "the court in *Griffin* was presented with very nearly the precise factual circumstances with which we are faced in the instant case." *Kestler*, 48 F.3d at 804, n.6 (Petition A.8).

Accordingly, in *Griffin*, unlike in *Simpson*, the North Carolina Court of Appeals dealt with the identical issue raised by Kestler in this action and resolved that issue against him. In essence, as the court below determined, the North Carolina Court of Appeals held that the contractual right at issue in *Simpson* vested after a member completed five years of membership service, while the claimed contractual right at issue in *Griffin* vested only at the time of retirement. The issues are distinguishable, and the cases deciding them, therefore, are also distinguishable.

Because the Fourth Circuit properly applied North Carolina law in its decision, Kestler's petition for writ of certiorari should be denied.

III. THE POSSIBLE PRECEDENTIAL EFFECT OF THE FOURTH CIRCUIT'S DECISION DOES NOT WARRANT THE GRANTING OF A PETITION FOR WRIT OF CERTIORARI.

As his final argument, Kestler contends that the disposition of issues in a number of pending cases may be "adversely affected by the Fourth Circuit's decision to follow *Griffin* rather than *Simpson*" (Petition 18). This argument falls far short of showing that a writ of certiorari is appropriate in this matter.

Defendants initially note that a similar argument could be made regarding almost any decision of any appellate court. That is, most published decisions of appellate courts have the potential of influencing decisions of other courts in cases where the same or similar issues are presented. Moreover, whether the Fourth Circuit's decision in this case will "adversely affect" the outcome of the other cases listed by Kestler is purely a matter of perspective; defendants could just as easily have made the same argument had the court below held in favor of Kestler.

Only one of the cases cited by Kestler -- *LaBroad v. The Teachers' and State Employees' Retirement System*, 3:94CV210McK (W.D.N.C.) -- involves the same statute at issue in this case. That federal case, of course, will be directly affected by any decision of the Fourth Circuit. The remaining cases all involve other statutes; most involve the same legislative change to the disability retirement formula that was at issue in *Simpson*. Defendants submit that the courts before which these cases are currently pending or to which they may be appealed are quite capable of undertaking a thorough analysis such as the one engaged in by the Fourth Circuit in this case to determine the proper law to apply.

Notably, five of the eight cases listed by Kestler are pending in the state courts of North Carolina. While the courts deciding those cases will undoubtedly give due consideration to the opinion of the Fourth Circuit, it is well established in North Carolina that a federal court's interpretation of state law, while instructive, is not binding on the state courts of North Carolina. *See*, *e.g.*, *Huggard v. Wake County Hospital System*, 102 N.C. App. 772, 775, 403 S.E.2d 568, 570 (1991). A different holding upon review by this Court, then, would not in any way change the fact that the courts of North Carolina could and would conduct independent reviews in determining the precedential significance of *Griffin* and *Simpson*.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

MICHAEL F. EASLEY
North Carolina Attorney General

Alexander McClure Peters*
Special Deputy Attorney General

North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629
Telephone: (919) 733-6026

August 29, 1995

**Counsel of Record*

APPENDIX

APPENDIX
TABLE OF CONTENTS

Griffin v. The Board of Commissioners of the Law Enforcement Officers' Benefit and Retirement Fund, 84 N.C. App. 443, 352 S.E.2d 882 (1987) 1a

Griffin v. The Board of Commissioners of the Law Enforcement Officers' Benefit and Retirement Fund, 319 N.C. 672, 352 S.E.2d 776 (1987) (denial of petition for discretionary review and dismissal of appeal) 7a

Simpson v. North Carolina Local Governmental Employees' Retirement System, 88 N.C. App. 218, 363 S.E.2d 90 (1987) . . . 9a

Simpson v. North Carolina Local Governmental Employees' Retirement System, 323 N.C. 362, 372 S.E.2d 559 (1988) (*Per curiam* affirmance) 23a

THIS PAGE INTENTIONALLY LEFT BLANK

MARVIN W. GRIFFIN v. THE BOARD OF COMMISSIONERS OF THE LAW ENFORCEMENT OFFICERS' BENEFIT AND RETIREMENT FUND

No. 8626SC521
North Carolina Court of Appeals
Filed 17 February 1987
[84 N.C. App. 443, 352 S.E.2d 882]

Pensions § 1 - disability retiree employed - reduction in benefits - statute applicable to plaintiff

A 1980 amendment to N.C.G.S. § 143-166(y) which required defendant to determine whether disability retirees were gainfully employed and to reduce the benefits of those who were under a schedule which was set forth applied to plaintiff whose retirement became effective 1 September 1981, and there was no merit to plaintiffs argument that he was eligible to retire on disability earlier than he did and that he therefore should not have been subjected to the terms of the statute.

APPEAL by plaintiff from *Saunders, Chase B., Judge*. Judgment entered 10 January 1986 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 15 October 1986.

Boyle, Alexander, Hord and Smith, by Norman A. Smith, for plaintiff appellant.

Attorney General Thornburg, by Assistant Attorney General Norma S. Harrell, for defendant appellee.
[Page 444]

PHILLIPS, Judge.

In September 1981 plaintiff, a retired Mecklenburg County law enforcement officer, began receiving disability retirement payments from the Law Enforcement Officers' Benefit and Retirement Fund established by G.S. 143-166, *et seq*. Because he had certain other earnings during 1982, in April 1983 defendant demanded, under the authority of G.S. 143-166(y), that plaintiff return a certain amount of the money that he received from the fund that year. Plaintiff paid the sum demanded under protest and brought this suit to recover it. In the complaint he alleged only that the provisions of G.S. 143-166(y) relied upon by defendant do not apply to him because his retirement rights had vested before those provisions were enacted, and that if the provisions are interpreted to affect his benefits they are unconstitutional. Judge Saunders overruled both contentions after hearing the matter on stipulated facts, the most pertinent of which follow:

Before 1980 G.S. 143-166, *et seq.*, the statutes governing the Law Enforcement Officers' Benefit and Retirement Fund, contained no provision reducing the benefits of disability retirees because they worked and earned other monies. In February 1979 while on duty as a Mecklenburg County police officer plaintiff fell and sustained an injury to his shoulder. Though he returned to work on 21 March 1979 he continued to have problems with the injured shoulder, and was unable to work at various times thereafter because of it. On 1 March 1980 his shoulder required surgery and he was not able to work until 26 September 1980 when he returned to light duty as a dispatcher. About 16 December 1980 plaintiff's shoulder was operated on again and he has not worked as a law enforcement officer since then, either on light or regular duty. During the months following this latter surgery plaintiff's shoulder did not materially improve and he was examined by his doctor

several times, one of which was on 4 June 1981. At that time he and the doctor discussed as possibilities plaintiff either retiring as disabled or of undergoing another operation, and the doctor told him they would discuss the matter further the next time he was examined. When plaintiff went to the doctor on 9 July 1981 the shoulder was still not functioning properly and he told the doctor he had applied for disability retirement on 15 June 1981 and the doctor said he would agree to it. In the application, later supported by a certificate from the
[Page 445]
doctor that plaintiff was disabled because of the injured shoulder, plaintiff requested that his retirement be effective 1 September 1981. In due course the application was approved as submitted and plaintiff was so notified by a letter from the fund dated 11 September 1981. The letter also stated that the fund's medical board was of the opinion that his condition could improve to the point of him being able to again perform the duties of a law enforcement officer, and that his status would be re-evaluated a year later. In the meantime, on 24 June 1980, the General Assembly amended G.S. 143-166(y) to require the defendant board to determine whether disability retirees were gainfully employed and to reduce the benefits of those that were under a schedule that was set forth and that is not in dispute. The act became "effective on July 1, 1980, for employees retiring on or after July 1, 1980," but for employees retiring prior to July 1, 1980, it became effective on July 1, 1981. The statute was further amended on the 8th day of October 1981, effective upon ratification, to make it applicable only to those disability beneficiaries "who retired after July 1, 1981."

Quite plainly, it seems to us, the judgment appealed from was correct and we affirm it. Contrary to plaintiff's argument, G.S. 143-166(y) as amended cannot be properly interpreted as not applying to him. The enactment is not ambiguous; its application is expressly determined by the retirement date of each employee involved and the date of plaintiff's retirement clearly subjected him to the terms of the act. Plaintiff's argument, that he was permanently disabled almost from the time of his injury, and thus eligible to retire on disability earlier than he did, is unavailing. Under the statute his rights were established not by his condition at a certain time, which is debatable, but by the date of his retirement, which is not. Thus, we see no basis for plaintiff's argument that applying the act to him violates his constitutional rights. The legislation that first reduced the benefits of future disability retirees who work and earn money was enacted in 1980, more than a year before plaintiff retired, and we know of no authority for the proposition that plaintiff's retirement rights vested before then. The decisions that plaintiff relies upon involved employees whose benefits were reduced *after* their retirement, which is not plaintiff's situation, and a discussion of those authorities would serve no purpose. Nor was plaintiff adversely affected by the second

[Page 446]

amendment to G.S. 143-166(y), enacted after his retirement. The first amendment to G.S. 143-166(y) which, under the conditions above stated, reduced the benefits of law enforcement officers who retired on disability after July 1, 1980 was still in effect when plaintiff retired on September 1, 1981; and the later amendment did only two things, neither of which is constitutionally impermissible. It continued his status established by the prior enactment as a retiree that was accountable for his future earnings and it increased the amount of money that plaintiff could earn without penalty.

Affirmed.

Judges PARKER and COZORT concur.

THIS PAGE INTENTIONALLY LEFT BLANK

GRIFFIN v. BD. OF COM'RS OF LAW OFFICERS' RETIREMENT FUND

No. 143P87.

Case below: 84 N.C. App. 443

[319 N.C. 672, 356 S.E.2d 776 (1987)]

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 June 1987. Motion by defendant to dismiss appeal for lack of substantial constitutional question allowed 2 June 1987.

THIS PAGE INTENTIONALLY LEFT BLANK

JESSE R. SIMPSON, RICHARD D. MOORE, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED v. NORTH CAROLINA LOCAL GOVERNMENT EMPLOYEES' RETIREMENT SYSTEM, A CORPORATION; BOARD OF TRUSTEES OF THE NORTH CAROLINA LOCAL GOVERNMENT EMPLOYEES' RETIREMENT SYSTEM, A BODY POLITIC AND CORPORATE; E. T. BARNES, DIRECTOR OF THE RETIREMENT SYSTEM DIVISIONS AND DEPUTY TREASURER FOR THE STATE OF NORTH CAROLINA (IN HIS OFFICIAL CAPACITY); HARLAN E. BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA AND CHAIRMAN OF THE BOARD OF TRUSTEES OF THE NORTH CAROLINA LOCAL GOVERNMENT EMPLOYEES' RETIREMENT SYSTEM (IN HIS OFFICIAL CAPACITY); AND THE STATE OF NORTH CAROLINA

No. 8710SC400

North Carolina Court of Appeals

Filed 22 December 1987

[88 N.C. App. 218, 363 S.E.2d 90]

1. Retirement Systems § 2 - relationship between retirees and system contractual

    The relationship between plaintiffs, who were former firemen who qualified for disability benefits, and defendant Retirement System was one of contract, since (1) the retirement benefits were deferred compensation, already in effect earned, merely transubstantiate over time into a retirement allowance; and (2) fundamental fairness dictated such an interpretation.

2. Constitutional Law § 25.1; Retirement Systems § 2 - impairment of pension rights - reasonableness not determined - violation of contract clause of U.S. Constitution not determined

   States may impair contracts in the exercise of their police power in order to protect the general interests of the commonwealth; therefore, even if N.C.G.S. § 128-27(d4) did impair plaintiffs' pension rights, it did not necessarily violate the contract clause of the U.S. Constitution, U.S. Const. art. 1, § 10, cl. 1, since the trial court made no determination as to whether the impairment was reasonable and necessary to serve an important public purpose.

APPEAL by plaintiffs from *Farmer, Robert L., Judge*. Order entered 9 October 1986 in WAKE County Superior Court. Heard in the Court of Appeals 28 October 1987. **[Page 219]**

On 1 July 1985 plaintiffs filed a petition and complaint in Wake County Superior Court against defendants seeking, inter alia, to have N.C. Gen. Stat. § 128-27(d4) declared unconstitutional, to have their action certified as a class action, and an order requiring defendants to pay plaintiffs all past, present, and future benefits to which they are entitled. The challenged statute fixes the method of calculating disability benefits under the North Carolina Local

Governmental Employees' Retirement System on and after 1 July 1982. On 9 July 1986 plaintiffs moved for partial summary judgment, and on 8 September 1986 defendants responded, opposing plaintiffs' motion and moving for summary judgment on their own behalf. The trial court examined the supporting documents, heard oral arguments, found no genuine issue of material fact, and allowed defendants' motion. Plaintiffs appealed.

Daniels & Daniels, P.A., by Marvin Schiller, for plaintiff-appellants.

Attorney General Lacy H. Thornburg, by Norma S. Harrell, Assistant Attorney General, for defendant-appellees.

WELLS, Judge.

The question presented is whether the pension rights of vested members of the North Carolina Local Governmental Employees' Retirement System (Retirement System) may be made subject to adverse legislative modification without violation of U.S. Const. art. 1, § 10, cl. 1, prohibiting states from enacting any law "impairing the Obligation of Contracts." This is a case of first impression in North Carolina. [fn1]

The facts are not in dispute. Both plaintiffs are former firemen for the City of Greensboro who have qualified for disability benefits under the Retirement System. Mr. Simpson became a vested member [fn2] of the Retirement System by 6 August 1969 and
[Page 220]
qualified for disability benefits on 1 March 1983. Mr. Moore became a vested member of the Retirement System by 16 July 1978 and qualified for disability benefits on 1 January

1984. Under N.C. Gen. Stat. § 128-27(d3), which was in force from 1 July 1971 through 30 June 1982, a member of the Retirement System retiring on disability received a benefit calculated as if he had worked to the age of 65 years. Further, members whose creditable service began prior to 1 July 1971, like plaintiffs in the present case, received no less than the allowance provided by prior law, G.S. § 128-27(d2).

On 9 October 1981, the General Assembly modified, effective 1 July 1982, Chapter 128 by adding G.S. § 128-27(d4), which provides as follows:

> (d4) Allowance on Disability Retirement of Persons Retiring on or after July 1, 1982. - Upon retirement for disability, in accordance with subsection (c) of this section on or after July 1, 1982, a member shall receive a service retirement allowance if he has qualified for an unreduced service retirement allowance; otherwise the allowance shall be equal to a service retirement allowance calculated on the member's average final compensation prior to his disability retirement and the creditable service he would have had had he continued in service until the earliest date on which he would have qualified for an unreduced service retirement allowance.

Thus, under the amended statute a member of the Retirement System retiring on or after 1 July 1982 receives either an unreduced service retirement allowance or an allowance calculated as if he had worked to the earliest date on which he would have been eligible for an unreduced benefit,

basically either 30 years or age 65. This means that a member beginning creditable service at, for example, age 20, can no longer, upon disablement after vesting, receive a benefit calculated as if he had worked 45 years. Instead, he may claim no more service credit years than a person retiring on service retirement after a full career of 30 years. Obviously, members such as plaintiffs herein who began work prior to age 35, and/or members who can claim additional service credits such as military service, stand to receive, upon disablement after vesting, a smaller retirement allowance under the modified statute than under prior law. Mr. Moore presently
[Page 221]
receives $564.88 per month as his retirement benefit, whereas he would have received $717.08 under the prior statute. Mr. Simpson now receives $801.91 monthly, whereas under the antecedent statute his allowance would have been $1,182.82. The gravamen of plaintiffs' complaint is that they are entitled to have their disability retirement benefits calculated according to the more favorable formula in effect at the time they became vested members of the Retirement System.

Plaintiffs contend that an adverse change in the benefit structure after vesting constitutes an impairment of contractual rights. In response, defendants contend, first, that North Carolina case law either does not support plaintiffs' position, or controverts it, as in *Griffin v. Bd. of Com'rs. of Law Officers' Retirement Fund*, 84 N.C. App. 443, 352 S.E.2d 882, *disc. rev. denied* 319 N.C. 672, 356 S.E.2d 776 (1987). Defendants claim *Griffin* stands for the proposition that the General Assembly can make changes in the disability retirement structure and apply those changes to members with vested rights who have not yet retired on disability retirement at the time the changes came into force.

Defendants further point out that the General Assembly has expressly retained, per G.S. § 128-38, "the right at any time and from time to time . . . to modify or amend in whole or in part any or all of the provisions of the North Carolina Local Governmental Employees' Retirement System." Finally, defendants contend that even if the relationship between the Retirement System and plaintiffs is one of contract, and even assuming an impairment by virtue of the 1981 amendment, the impairment is nevertheless lawful because it is reasonable and necessary to serve an important public purpose.

We have looked to the case law of other jurisdictions to find guidance in deciding this difficult case and have encountered a kaleidoscope of multifarious and conflicting views. *See, e.g.*, Annot., 52 A.L.R. 2d 437 (1957). In a few states, the issue has been removed from the courts' province by constitutional amendment or by statutory enactment expressly providing that public employee pension plans give rise to contractual rights. Most of those courts which have confronted the question presented by this case, or questions similar to the one presented here, have adopted one of five approaches, which we review briefly below.
[Page 222]

First, a few jurisdictions still follow the traditional common law in holding that public employee pensions are gratuities creating no contractual rights until the member satisfies all his retirement requirements. According to this view, such pension benefits are mere expectancies, modifiable or revocable at the whim of the legislature. For examples of such cases *see, e.g., Etherton v. Wyatt*, 155 Ind. App. 440, 293 N.E.2d 43 (1973) and *Creps v. Bd. of Firemen's Relief & Retirement Fund Trustees*, 456 S.W.2d 434 (Tex. 1970).

Apparently, a majority of courts have in recent years abandoned the common law gratuity theory in favor of an approach which accords more protection to such pension rights. The Minnesota case *Christensen v. Mpls. Mun. Emp. Retire. Bd.*, 331 N.W. 2d 740 (Minn. 1983) represents the second approach reviewed here. In this case, the Supreme Court of Minnesota declared that "a public employee's interest in a pension is best characterized in terms of promissory estoppel." The court went on to imply in law a contract to enforce the state's promise of pension benefits that had been reasonably relied upon.

Third, a large number of states have construed public pension plans as giving rise to contractual rights - even in the absence of a clear statement of legislative intent to contract. *See Pineman v. Oechslin*, 494 F. Supp. 525 (D. Conn. 1980), for cases cited therein. Some of these states have held that such pension rights vest unconditionally at the moment of employment. *See, e.g., Yeazell v. Copins*, 98 Ariz. 109, 402 P.2d 541 (1965). Other states follow the so-called California rule according to which such pension rights, though contractual, may be modified by the legislature where necessary and reasonable, provided that any disadvantages to employees are offset by comparable new advantages. *See, e.g., Allen v. Bd. of Admin.*, 34 Cal. 3d 114, 192 Cal. Rptr. 762, 665 P.2d 534 (1983). Courts have generally been more likely to find vested contractual rights arising out of voluntary plans than out of mandatory ones and, further, have generally shown themselves more solicitous of employees who have already retired than of those who have not. *See* Annot., 52 A.L.R. 2d, *supra*, at 441-43.

Fourth, at least two jurisdictions, however, have stubbornly rejected the contractual approach. In *Spina v. Consol. Police &* **[Page 223]** *Firemen's Pension Fund Comm'n*, 41 N.J. 391, 197 A.2d 169 (1964), the Supreme Court of New Jersey held, in an opinion authored by Chief Justice Weintraub, that the provisions of a pension plan, like other terms and conditions of public service employment, "rest in legislative policy rather than contractual obligation, and hence may be changed except of course insofar as the State Constitution specifically provides otherwise." The court stated that legislative acts do not give rise to contractual rights abridging the power of succeeding legislatures to make revisions for the good of all unless the statute "expressly calls for the execution of a written contract or confirms a settlement of a dispute." The Supreme Court of Connecticut has recently embraced the Spina approach in *Pineman v. Oechslin*, 195 Conn. 405, 488 A.2d 803 (1985). The Connecticut court conceded a "seductive appeal in the contract-oriented approaches" but refused to find that a statute gives rise to contractual rights absent an unmistakable expression of legislative intent to contract. The court summed up as follows:

> Upon examination of the case law in this area, it becomes clear that the contract approach plays havoc with basic principles of contract law, traditional contract clause analysis and, most importantly, the fundamental legislative prerogative to reserve to itself the implicit

> power of statutory amendment and modification.

[1] After having carefully considered both relevant North Carolina case law and the relative merits and weaknesses of the four approaches reviewed above, we have decided to hold that the relationship between plaintiffs and the Retirement System is one of contract. Our Supreme Court held in *Bridges v. Charlotte*, 221 N.C. 472, 20 S.E.2d 825 (1942) that the retirement benefits received by state employees from the retirement fund there challenged were payments of salary for services rendered. Twenty years later, in *Insurance Co. v. Johnson, Comm'r of Revenue*, 257 N.C. 367, 126 S.E.2d 92 (1962), our Supreme Court stated: "A pension paid a governmental employee . . . is a deferred portion of the compensation earned for services rendered." If a pension is but deferred compensation, already in effect earned, merely transubstantiated over time into a retirement allowance, then an employee has contractual rights to it. The agreement to defer the

[Page 224]

compensation is the contract. Fundamental fairness also dictates this result. A public employee has a right to expect that the retirement rights bargained for in exchange for his loyalty and continued services, and continually promised him over many years, will not be removed or diminished. Plaintiffs, as members of the North Carolina Local Governmental Employees' Retirement System, had a contractual right to rely on the terms of the retirement plan as these terms existed at the moment their retirement rights became vested.

[2] But to hold that Article 3 of G.S. § 128 gives rise to contractual rights does not dispose of the question presented.

As *Maryland State Teachers Ass'n v. Hughes*, 594 F. Supp. 1353 (D. Md. 1984) explains, a state does not automatically run afoul of the Contract Clause of the U.S. Constitution by impairing pension rights. In *Hughes*, which represents the fifth and final approach reviewed here, a class of public schoolteachers and other state employees brought suit alleging that Maryland's 1984 "Pension Reform Act" violated the Contract Clause of the U.S. Constitution. Relying on U.S. Supreme Court Contract Clause jurisprudence, the *Hughes* court held that to the extent, if any, the challenged Act had impaired purported contract rights, the impairment was constitutional because it was reasonable and necessary to serve an important public purpose. We adopt the *Hughes* approach because it accords some protection to plaintiffs' pension rights without substantially derogating from the General Assembly's prerogatives.

To be sure, on its face the Contract Clause of the U.S. Constitution absolutely prohibits states from impairing contractual obligations. However, the Supreme Court has recognized that states may impair contracts in the exercise of their police power in order to protect the general interests of the commonwealth. [fn3] In *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), the Supreme Court established a tripartite test for deciding cases involving alleged Contract Clause infringements when a state is a

party to the contract. [fn4] The reviewing court must first ascertain whether a contractual obligation arose under the statute. Second, the court must determine if the state's actions impaired an obligation of the state's contract. Third, the court must determine whether the impairment, if any, was "reasonable and necessary to serve an important public purpose."

We have held, *supra*, that Article 3 of Chapter 128 of the North Carolina General Statutes creates contractual obligations. We also find that rights arising under this statute were impaired inasmuch as plaintiffs stand to suffer significant reductions in their retirement allowances as a result of the legislative amendment under challenge. But we conclude that the question of whether the amendment at issue is violative of the Contract Clause because it is reasonable and necessary to serve an important state interest has not been properly resolved in the court below.

Mr. E. T. Barnes, Deputy Treasurer and Director of the Retirement Systems Division of the North Carolina Department of State Treasurer, has elaborated the State's interest in the challenged amendment in his affidavit contained in the Record from which we quote the following pertinent part:

> From the Retirement System's standpoint, an unreduced retirement, or one normally based on 30 years or age 65, is a full career. Prior to the amendment to the disability retirement provisions in 1982, between 15 and 20% of our retirements had become disability retirements. A significant number of those were coming in the later years for people who were already eligible to retire on service retirement and, in all probability, would have been contemplating service retirement anyway. The possibility of disability retirement appeared to be a device by which people were able to improve their retirement allowances because of the relatively frequent types of health problems which

> appear in later years. There seemed to be little justification for allowing a disability to be extended as if the person had worked until

> age 65 while another person, with the same service, would be considered to have retired at a normal career retirement point.

Mr. Barnes' affidavit shows that the changes in the System's disability retirement requirements challenged by plaintiffs were made primarily to correct inequities in the System. We are not persuaded that this explanation demonstrates or reflects that these changes were reasonable *and necessary* to serve an important state interest. We perceive that defendants' burden to show that there are no genuine issues as to any material fact in this action and that defendants are entitled to judgment as a matter of law has not been met. *See* N.C. Gen. Stat. § 1A-1, Rule 56 of the Rules of Civil Procedure. Accordingly, we hold that summary judgment for defendants was improvidently entered and remand for further proceedings consistent with this opinion.

Reversed and remanded.

Judges JOHNSON and COZORT concur.

[fn1] In the case *Harrell v. Retirement System*, 271 N.C. 357, 156 S.E.2d 702 (1967) our Supreme Court stated as follows: "We find it unnecessary to determine on this record to what extent, if any, plaintiffs' rights to their retirement allowances became vested so that the General Assembly could not by legislation constitutionally impair such rights."

[fn2] In North Carolina the right of members of the Retirement System to retirement benefits vests after five years of creditable service. *See* G.S. § 128-27(a)(1) and (c).

[fn3] *See, e.g., Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934). *See generally* B. Schwartz, A Commentary on the Constitution of the United States, Part II: The Rights of Property 266-306 (1965).

[fn4] Where the contract is between private parties the test is somewhat different. *See* United States Trust at 25. *See generally* Note, A Process-Oriented Approach to the Contract Clause, 89 Yale L.J. 1623 (1980); Note, Rediscovering the Contract Clause, 97 Harv. L. Rev. 1414 (1984).

THIS PAGE INTENTIONALLY LEFT BLANK

JESSE R. SIMPSON, RICHARD D. MOORE, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED v. NORTH CAROLINA LOCAL GOVERNMENT EMPLOYEES' RETIREMENT SYSTEM, A CORPORATION; BOARD OF TRUSTEES OF THE NORTH CAROLINA LOCAL GOVERNMENT EMPLOYEES' RETIREMENT SYSTEM, A BODY POLITIC AND CORPORATE; E. T. BARNES, DIRECTOR OF THE RETIREMENT SYSTEM DIVISIONS AND DEPUTY TREASURER FOR THE STATE OF NORTH CAROLINA (IN HIS OFFICIAL CAPACITY); HARLAN E. BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA AND CHAIRMAN OF THE BOARD OF TRUSTEES OF THE NORTH CAROLINA LOCAL GOVERNMENT EMPLOYEES' RETIREMENT SYSTEM (IN HIS OFFICIAL CAPACITY); AND THE STATE OF NORTH CAROLINA

No. 2A88
Supreme Court of North Carolina
Filed 6 October 1988
[323 N.C. 362, 372 S.E.2d 559]

APPEAL by defendants pursuant to N.C.G.S. § 7A-30(1) from a decision of the Court of Appeals, 88 N.C. App. 218, 363 S.E.2d 90 (1987), which reversed summary judgment for defendants entered at the 6 October 1986 Session of Superior Court, WAKE County, *Farmer, J.*, presiding, and remanded for further proceedings consistent with the opinion. Heard in the Supreme Court on 13 September 1988.

Anderson, Schiller & Rutherford, P.A., by Marvin Schiller, for plaintiff appellees.

Lacy H. Thornburg, Attorney General, by Norma S. Harrell, Assistant Attorney General, for defendant appellants.

PER CURIAM.

Affirmed.